State and Sovereignty

Preliminary Remark

'State' and 'sovereignty' are two concepts that refer to each other in their historical development and their legal classification. From the 17th century to our times, there has been such a close connection that both concepts are mutually dependent. Nevertheless, they are not entirely dependent on each other, neither in reality nor in legal theory. There were sovereign princes who did not rule over a state, just as there were and are states that are not sovereign.

The German-language history of the two concepts up to the French Revolution is shaped by the challenge of Western precedents. The Latin and Italian, and especially the French, conceptual formations have impregnated the German ones in such a way that difficulties constantly arose in adapting them to the reality of Imperial law or in using them appropriately. The Western head start already begins with the earlier adoption of Latin terms into the national languages. In the 13th century, 'status', meaning condition, estate, position, situation, is Frenchified to 'Estat'. As early as the 12th century, 'souverain' and 'sovrainetez', derived from 'superanus', appear as French expressions. The Germanization occurs only with considerable delay, from 'status' to 'stat' in the 15th century, and the adoption of sovereignty from French not until the 17th century. This temporal difference has considerable consequences for conceptual history, because the prehistory of our two concepts points to entirely different word fields and areas of experience than in the West. Here, the two concepts became capable of theoretical treatment much earlier than with us. Thus Machiavelli already knew 'stato' as a standalone concept that did not require an attributive supplement, such as of the prince or a republic—a usage that only became established with us in the 18th century.

Despite the ongoing common European-Latin history of theory, our two concepts in particular, more than others in political and social language, remain dependent on translated receptions from the West. This results in diachronic distortions in synchronous use. Sovereignty, insofar as it, roughly speaking since Bodin, indicates the final decision-making authority within a state and the complete external independence of that state, was realistic in the France of Louis XIV, but in Germany it was everywhere a target concept that had yet to be realized. For the territorial lords, within the feudally ordered estate-based constitution of the Empire, were truly 'sovereign' neither internally nor externally, even though they might be called so. And just as little was the Emperor, who remained legally and politically dependent on the Imperial Diet and the Imperial Princes. The sum of all princes, the Imperial Diet, and the Emperor never became a single unit of action to act sovereignly, like the 'King in Parliament'. The Empire never became a state in the French sense of the term. This corresponds to the German conceptual history of the word 'Staat'. The most frequent connotations, well into the eighteenth century, refer to situations relating to the estates; they mean 'estate', 'condition', 'ways of life', 'dignities', 'expenditure', 'pomp' and 'splendor', 'position', 'magnificence', and increasingly 'lordship', as exercised by the nobility, especially the princes in the 'princely state' (*Fürstenstaat*). Thus, 'Stat' can also mean 'office' or 'court'. Similar variants also exist in France, but there the abstract 'état souverain' appears as early as the 17th century, which only becomes established in German-speaking areas as 'souveräner Staat' (sovereign state) in the 19th century. Only in the theoretical language of natural law, which remained Latin until the Enlightenment, are there congruences that point to the identity of 'status' ('état', 'Stat') with the 'civil commonwealth' (*res publica*,

civitas). But here, too, at the latest since Rousseau and the great *Encyclopédie*, a French lead is evident: State has since been derived from the sovereign, self-determining society as a nation, something that was hardly asserted with this clarity in Germany. Also, the classically dogmatized triad of state power (chief, not monarch), state territory, and state population (nation) becomes established more quickly and consistently in the French of the Enlightenment than in Germany. Its territories and its peoples could never be identified with a state as much as France.

Since the French Revolution, the conceptual histories, having become specifically national-linguistic, have diverged even further. While in Germany 'Staat' rises to a central guiding concept, in French 'état' recedes into the background next to 'république' or 'empire', only to be politically actualized more strongly under Napoleon III, in the right-wing camp, and in Vichy. In addition, 'état' in French retains numerous non-political meanings, such as 'condition', 'situation', 'state of affairs', ubiquitous meanings that are suppressed in German by the strictly political concept of the state.

The German conceptual history before and after the French Revolution can be compared to the passage through the narrow neck of an hourglass. Before around 1800, the word 'Staat' had numerous estate-based meanings that were purely additively retrievable, such as 'Staat' as 'expenditure', 'office', etc., or that referred attributively to estate-based rule, such as 'princely state' (*Fürstenstaat*), 'court' (*Hofstaat*), etc. Around 1800, 'Staat' gains a monopoly position and a claim to exclusivity that swallows almost all estate-based connotations. Now the history of our concept runs through a nozzle that condenses all meanings into the 'state as such'. 'State' is brought to its new concept as the 'modern state'; it becomes a subject of action with its own will, a really posited great personality, an organism, also an organization, in which society as the state's populace merges. Beyond its institutional meaning, it becomes the 'ideal state', the 'state in and of itself', against which all empirical states are measured. 'State' as a new collective singular absorbs all constitutional provisions of state law: a result of the historico-philosophical transposition of preceding natural law definitions, which, since Hobbes and Pufendorf, had already taught to see the 'state' as a great person, as a *persona moralis*. New and revolutionary in theory was that this self-founding 'state as such' as a 'rational state' (*Vernunftstaat*) was only to be realized in the future.

Once brought to this concept, it now became possible—and now the narrow neck of our hourglass opens—that this state of eternal reason received action-guiding qualifying determinations with a historically unique future. The state of the modern era became both an ontological general concept, applicable to all of history, as well as a variable target concept. It becomes a concept of action that fans out along party-political lines, without for that reason ceasing tor efer reflexively to the same basic concept of a 'true state', of the 'state as such', which was impossible in this way before 1800. Conceptually arising from the state of reason are: 'Rechtsstaat' (rule of law state), 'Kulturstaat' (cultural state), 'holy state', more rarely 'Christian state' or 'corporate state', 'constitutional state', 'power state', 'nation state', 'people's state', 'social state', finally 'total state' and the state that abolishes itself—anticipations that all, more or less, have entered into reality.

The four hypotheses of our lexicon are to be redeemed in this unfolding conceptual history. The concept of the state is temporalized, insofar as it postulates determinations that are always yet to be redeemed in the future, beyond the legal assessment of the current condition. — It becomes ideologizable, insofar as every alternative concept of the state partially or completely excludes the other, thus placing it under

suspicion of ideology from its own premises. — It becomes politicized, insofar as the social prerequisites that enter into it are increasingly absorbed in favor of a genuinely ruling state, which becomes an end in itself, defined legally, morally, nationally, culturally, socially, humanly, or otherwise. — Finally, the state is democratized, insofar as the concept increasingly sheds its personal function of rule, stemming from the field of estate-based meanings, in favor of a state power that—legitimized at the latest since 1918—derives from popular sovereignty. This applies, with ideological-critical reservation, even to the 'Führer state', whose Führer could presume to understand himself as the incarnation of his people.

Corresponding to these state contexts, the conceptual history of 'sovereignty' also proceeds with tension. Fully received in the German-speaking world only in the 18th century, the concept of sovereignty initially served to assign the supra-estate final decision to the prince—legislatively, executively, and also judicially—in order to generate a modern state at all. It was a future or target concept to which reality only rarely corresponded, perhaps most closely in Prussia. In the 19th century, 'state sovereignty' dominated, a theoretically consistent concept which empirically contained the compromise of mediating between the sovereignty of the prince and that of the people. Thus, as early as the 19th century, the constitutional question arose as to what extent sovereignty could be divisible within a state—by definition, a contradiction in terms.

But due to the federal structure of the German Confederation, and after 1867/1871 in a weakened form in the German Empire, the question also arose externally (→ Confederation). How far does the sovereignty of a member state extend, where is it absorbed by federal power? The "sovereignty of law" (Kelsen) is one of the specifically German answers to this dilemma, just as the concept of 'Rechtsstaat' (rule-of-law state) had already enabled a gradual transposition of the estate-based Imperial laws into modern state law.

Structurally, analogous problems have emerged since the Second World War. International organizations and, even more so, transnational communities lead to a delegation of sovereignty rights, de facto to the superpowers, legally to new supranational institutions, without the states thereby ceasing to be states. 'State' and 'sovereignty' are no longer entirely relatable to one another. The final decision-making capacity internally and the independent capacity for action externally, i.e., the old criteria of sovereignty, coincide no longer with the factually and legally restricted room for maneuver of the states.

Also within states, seen globally very differently, new powers are stirring, which to have formerly suppressed and domesticated was the specific achievement of state-building. In terms of conceptual history, we are thus approaching, under completely new conditions, situations that are comparable to pre-state times.

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I. Introduction

Otto Brunner, in his classic 1939/59 work "Land und Herrschaft" (Land and Lordship), which preludes our lexicon, explained and justified the heuristic necessity of conceptual history using the example of the concept of the state. He raised awareness of how questionable it is in historical research to transfer

concepts of modern 19th/20th century state doctrine to medieval conditions, especially when dealing with the "state of the Middle Ages" in legal and constitutional history. His methodological advice on how to counter the alienation of historical facts through a linguistic understanding committed to the present stood in the tension between, on the one hand, strictly source-language-based concept formation and, on the other, the use of indispensable analytical concepts from systematic legal and social sciences, as far as possible with precise historical reference. Georg von Below's attempt "to interpret the old sources with modern concepts" was bound to fail. "But nothing would be more wrong than to believe that historical work could do without modern concepts. They must only be recognized in their own historical conditionality".

The word and concept of 'state' are indeed a particularly striking example of the old problem, newly actualized by Brunner for the science of history, of the appropriateness of historical concept formation.

The application of the term 'state' to all cultures and periods of world history can be advocated if it is made conscious and methodologically justified in terms of its (comparative) value as well as its limited explanatory power. In a broad, culturally and anthropologically justifiable sense, there has been no human existence in history without a sanctioned order, serving coexistence internally and protection externally, of smaller or larger social units. It is a matter of definitional agreement whether the word 'state' should be used as a formalized general concept for this purpose (if so, from what threshold of scope and durable organizational intensity).

Undoubtedly, in the High Middle Ages, from which the concrete European conceptual history of 'state' must begin, political communities, associations, and organizations of rule existed to which the word 'state' can be applied, although it was not used or was far from the concept of the 'modern state'.

Otto Hintze pointed out in 1931 that the general concept of 'state' was only coined at the time of the 'modern state', developed from the characteristics considered typical for it, and then "transferred" from this "youngest, present type of the modern state" to the older formations. The 'medieval state', which in itself never existed, was thus created, it can be sharply concluded, only through this retrospective reference. Hintze leaves it open whether our current understanding of medieval order is facilitated, complicated, or even misled by this anachronistic concept formation, thus only alluding to Otto Brunner's later question. Instead of the conceptual-historical approach, he chooses the path of analytical concept formation. That is: he states what he understands by the (in its definition controversial) concept of 'state', namely "that condition or constitution of a commonwealth, through which it is enabled to produce a common will and a common action...". "Condition and constitution" should thereby be understood "not purely statically, but also at the same time dynamically". The commonwealth itself could also be referred to "as a state". This formal definition of the state is concretized by Hintze, in deliberate distinction from the "hierarchical-feudal constitution of the Middle Ages," into the "ideal type of the modern state" (15th-19th century). He describes it through four successive, temporally overlapping structural phases: the "sovereign power-state within the framework of the European state system," the "relatively closed commercial state," the "liberal state of law and constitution," and the "nation-state, which encompasses and enhances all these tendencies, with a direction toward democracy." With this, Hintze has not only clarified the ideal type of the 'modern state' but has also implicitly given a hint about the real historical course in which the history of the concept 'state' has taken place. To investigate it, we first ask what

designations were available in the 13th/14th century, i.e., in the period between the reception of Aristotle and the beginnings of the structural type 'modern state', when the organization of rule and law of a political community was to be named. Can 'status'/'Staat' be found among these designations? If this was not the case, or only in its beginnings, the further question is when, how, and for what reasons the word 'state' (in various languages and spellings) emerged and eventually became dominant.

II. Estate Society and 'State'

1. 'State' before the "State": Late Medieval Terminology

The 'modern state' (in Hintze's sense) did not penetrate Europe simultaneously and uniformly against traditional autonomous powers and constitutional forms. This had an effect on the history of the concept and must be kept in mind when it is first generally stated that between the 13th and 15th/16th centuries, 'state' as a word and as a rationally intensified organization of rule established itself in uneven beginnings. The terms in the incipient 'statal' semantic field were numerous and varied. They designated: 1) "lordship" (*dominium*, *imperium*) and "authority" (*regimen*, government, regiment). For the forms of government, from the 12th century onwards, the Aristotelian concepts were available as well as the already common ones: such as *rex*, *regnum*; *princeps*, *principatus*, and others. 2) the "people" (*populus*, *status*/*Stände*/estates, landscape, etc.), always belonging to the monarch and, since the 13th/14th century, often clothed in the body metaphor; 3) the "land" (*terra*, *territorium*, *provincia*) as a personal association and (territorial) legal district of the "country people," the "landscape" of the *populus*, whereby the spatial meaning was inherent in the word from the beginning and was increasingly conceptually included; 4) the concretely experienceable mutual benefit brought about by the public, legally sanctioned community: the "common good," the "common estate," the "general best," the "commonwealth," etc. (*res publica*, *bonum commune*, *utilitas publica*, "Policey"). The traditional term '*res publica*', in contrast to the concrete concepts mentioned before, was an abstraction well-suited as a general umbrella term for differently constituted commonwealths. '*Res publica*' was therefore the general concept preceding the concept of 'state', one particularly available for the traditional ethical infusion of meaning. On this semantic field, which is indicated here without individual references, see the following articles of the *Lexikon Geschichtliche Grundbegriffe*: Adel, Bund, Bürger, Demokratie, Feudalismus, Gewaltenteilung, Gleichgewicht, Herrschaft, Legitimität, Macht/Gewalt, Monarchie, Naturrecht, Organ, Politik, Polizei, Regierung, Reich, Republik, Stand/Klasse, Souveränität, Verfassung, Verwaltung.

2. The Conceptual-Historical Lead in the Romance Countries, especially Italy in the 15th/16th Century

Regarding the etymology and word history of Lat. 'status', Ger. 'stat' or 'staat', Paul-Ludwig Weinachtprovides detailed information. Based on this, it is summarized here: the verbal noun 'status' with the basic meaning "manner, place, and action of standing" was adopted into the Romance languages ('stato', 'estado', 'estat') and increasingly, mostly in word combinations, became a fundamental political concept. This also applies to the German equivalents 'stant' and 'stat', which only separated from each other with their currently valid meanings in the 17th century. Because of this word-historical, but also due to constitutional-historical differences, the early word and conceptual history of 'Staat' must be considered separately for the Romance and Germanic areas.

Since Wolfgang Mager's study "On the Origin of the Modern Concept of the State" (1968), it has become clear that the concept of the state was formed in the 15th/16th century in Italy, Spain, France, and England, while Germany only joined this development in the 17th century. The word combinations '*status rei publicae*' and '*status civitatis*' used by Cicero were frequently taken up again from the 13th century onwards. They denoted the constitution or order of a commonwealth in general, but were usually (until the 16th century) related to the *regimen politicum* of the *politia = res publica* (Aristotle, Thomas Aquinas). The status of a prince was set apart from this and designated as '*status regalis*', '*ducalis*', etc. Into both meanings of *status*—the princely and the republican—flowed the experiences of the Italian communes as well as of the Spanish and French kingship. For both it applied that the bearers of rule and the *populus* were understood as belonging together in the sense of a political overall order.

Alongside the meaning "constitution," since Thomas already there stood the sense of the word "exercise of rule," "government," "possession of power," as in the chronicle of VILLANI from the first half of the 14th century. MACHIAVELLI can be cited as a representative example of the development of word and concept. The variety of meanings of *stato*, lying very close to one another and passing over into each other, can be rendered in Machiavelli as follows: "form of constitution, form of government, government; maintenance of rule; possession of power; party, family, social stratum; person (persons) who form the government or actually hold power; the totality of the ruled; territory." These diverse senses of the word, however, displayed tendencies toward concentration and contraction. A main indication of this was that the word *stato* increasingly no longer required the genitive attribute according to the classical formula *status reipublicae*, but by itself alone conveyed full meaning. Admittedly, in Machiavelli and his time expressions such as *stato popolare*, *stato di pochi*, *stato regio*—especially to designate forms of rule—remained in common use. But *stato* without addition could already approach, or even express, a conceptual unification of the three criteria "government," "people," "territory." Characteristic is the first sentence of the *Principe*: *Tutti li stati, tutti e' dominii che hanno avuto et hanno imperio sopra li uomini, sono stati e sono o republiche o principati.* "Stato" is thus a superordinate concept to "republic" and "principality" and is regarded as a type of political organization of rule, in that it is used in the plural.

Since the constitutional development of the European states went predominantly—indeed even in Italy—in the monarchical direction, the concept of the state between the 15th–17th centuries in fact became connected with monarchy. In the *status regalis* of the late Middle Ages, the personal ruler's power and the prince's service to the common good were already interwoven, but early on—i.e. certainly since the 14th century—in the doctrine of the two bodies of the king they showed the tendency toward conceptual separation. Thus GERSON distinguished the *vita corporalis, carnalis, personalis* of the king from his *vita civilis, politica, universalis*. If one pursued this line of thought further, then the *persona publica* of the king, as the supreme authority, drew together with the *res publica* or the *communitas* of the citizens into the concept of the polity governed by rule and into an overall order (*stato*).

Using the example of Machiavelli—though by no means only with him or through him—it becomes clear that in Italy around 1500 the process of the emancipation of the word *stato* (without addition) as the concept of a comprehensive politico-governmental-organizational unit had been completed. Yet thereby neither was a concept of the modern state, denoted solely by this word, generally validly established, nor were other traditional terms thereby rendered obsolete. This applied outside of Italy even more than in the land of origin of the absolute usage of the word that had developed in the city-state. Thus in France in the 16th century there was still a long way from a clearly delimited conceptual formation. Yet *estat* was

advancing, after the middle of the century, as the designation for the government and administration of the kingdom. The person of the king was at first represented by *couronne* and toward the end of the century by *estat*. The increasingly emphasized distinction between the *estat* of the kingdom and the person of the king, as well as the granting or denial of sovereignty to the king (Bodin, Huguenot “theory”), were expressions of the political crisis in France between the 1560s and 1590s, in which, along with the development of a “modern state,” the word *estat* came into use. Yet it is precisely Bodin’s book title of 1576 *De la république* (*De la république*), with the German translation *Vom gemeinen Regiment*, that shows that not only the German language but also the political-linguistic consciousness in France was still bound to the traditional concept *res publica*. This is understandable when one takes into view the constitutional reality of the great monarchies—such as France, Spain, the Habsburg lands—and of the smaller princely territories of the Empire. *Status regis* or *status principis* did not express a uniformly established constitution and administration over a territory belonging to them, because noble, ecclesiastical, and urban powers stood in opposition, which in turn claimed “stat” as authority and prestige.

A characteristic example is the accusation of the Catholic party against the Reformed that they formed *un Estat dans l'Estat* (a State within the State). The tendency of this accusation, repeated ever since, was, of course, that there should be only one single state for the commonwealth. '*Res publica*' initially encompassed the entire, legally and socially structured and differentiated, "commonwealth" of a kingdom or principality more unambiguously than the new, ambiguous word 'estat'. The connection of civil commonwealth and sovereignty, which was decisive for Bodin, could still be expressed with the traditional term '*res publica*': *La République... c'est une communauté gouvernée par puissance souveraine*. HOBBES finally equated *Common-Wealth*, *State*, and *Civitas* by definition.

3. Germany until the Thirty Years' War

The ambiguity and the applicability of the word 'status'/'Stat' to lordships and (urban) communities in general stood in the way of the tendency to replace '*res publica*' with 'Stat' and to designate principalities as 'Staten'. The traditional terms were therefore still indispensable, while the word 'Stat' advanced in many ways to designate partial aspects, sub-areas, and sub-institutions of the political order. Given the primacy and predominance of princely power, it naturally followed that 'Stat' was predominantly related to the prince and the institutions directly subordinate or assigned to him. It should be noted, however, that until the 18th century, the word could be used for partially or wholly ordered systems understood in terms of estates, and that the word- and concept-historical separation of 'Stand' (estate) and 'Stat' (state) in the 17th/18th century was not fully and consistently carried through. Characteristic is the designation of the United Netherlands as the '*Heren Staten*' (Lords States), and even in the law book title "*Allgemeines Landrecht für die preußischen Staaten*" (General State Law for the Prussian States) of 1794, these "states" still had the quality of "lands" represented by "estates".

Weinacht emphasizes, against Arnold Oskar Meyer, that the word 'Stat' ('Staat') is so little fixed on the "summation of all sovereign rights and claims to power of the prince" that it can just as well mean "the summation of the graded legal and life orders of the estate society".

Yet the development, despite all assertion of the estates and despite all "rights and liberties" of old origin, led to the "modern state" by the 18th century. On the European continent, it was progressively and

unevenly implemented by the princes, their officials, and the 'statists'—primarily lawyers—who served their state through publications, but nowhere so consistently before 1789 that privileged autonomous powers could not have maintained the dignity and weight of their own 'stat' or 'stand' (estate). The successful rise of princely power, up to the claim of its sovereignty internally and externally, corresponded to characteristic word formations, the emergence of which can mostly be proven as early as the 15th, but at the latest in the 16th century.

The successful emergence of princely power, up to its claim of sovereignty internally and externally, corresponded to characteristic word formations, the origin of which can mostly be traced back to the 15th century, but at the latest to the 16th century. 'Stat' in the sense of 'office', 'official power', 'government' ('regiment', 'authority') and the associated prestige was initially applied to the person of the prince. For example, it was said in MEISTERLIN's "Chronicle" that the Burgraves of Nuremberg were made princes by Emperor Charles (1364) and possessed *fursten stat und recht* (princely status and right) (mints, customs, and other privileges). Princely 'regiment' was often called 'Stat of the Prince'. However, since the 15th century, 'Stat' was also institutionally and personally detached from the person of the monarch. "*Hofstat*" (court), preceded in the 15th century by '*des hofes stat*' or '*hof und stat*', had the meaning of "court keeping" (services and servants for the entire expenditure of the princely court) in the 16th century, then "court order" and "court budget" of the finances. The comprehensive '*Hof-Stat*' was also specialized into '*Regiments-Stat*' (government administration) or '*Cammer-Stat*', i.e., the income and expenditure administration of the princely estates and finances.

'Stat' thus usually appears in word combinations, often in formulaic duplications (e.g., '*Stat und Regiment*', '*Amt und Stat*'). When the word stands alone, its respective meaning can only be determined from the context.

4. The Reception of the Concept 'Reason of State' and Its Consequences

In the first decades of the 17th century, the political slogan '*ragione di stato*' penetrated Germany and became associated with the debate over Machiavelli's doctrine. It was natural that it was linked to "reason of state," since Machiavelli had radically prioritized 'utility' and 'necessity' (*'utilità', 'necessità'*) as guiding principles of (princely) action, independent of the Christian-antique ethics that formed the basis of mirrors for princes. Although Machiavelli did not yet know the term '*ragione di stato*', it was coined in a related spirit in 1523 by Francesco Guicciardini, spread a generation later by Giovanni della Casa, and yet another generation later, in a Christian-mediated form, by the Jesuit BOTERO.

Guicciardini and della Casa had still used the plural '*ragione degli stati*', corresponding to Machiavelli's plural usage. This contained the meaning that there were not only generally valid rules of conduct recommendable for the expedient leadership of a state, but also that each individual state had its own peculiar "reason" which had to be recognized and followed as the guideline of its policy. This dual meaning of the general and the particular remained contained in the term '*ragione di stato*', used in the singular since Botero. The state's "own *ratio*"—that is, in the spirit of Machiavelli, a detachment from superior, normative traditional concepts, an emancipation of politics based on the 'utility' and 'necessity' of the state from religion and ethics. An expression of this absolute political thinking was the word 'interest' or 'state interest', which emerged at the same time as the concept '*ragione di stato*', became associated

with it, turned into a much-used political slogan in the early 17th century, and culminated in the sensational work of the DUC DE ROHAN (1639).

However, 'reason of state' and 'state interest' were by no means uniformly or even predominantly understood in a Machiavellian sense in the 16th and 17th centuries. The radicalism of presuppositionless politics met with opposition, depending on how the purpose of the state was valued and to what extent ethical norms were placed above the power drives of the princes. Although Machiavelli did not yet know the term '*ragione di stato*', it was coined in a related spirit in 1523 by Francesco Guicciardini, spread a generation later by Giovanni della Casa, and yet another generation later, in a Christian-mediated form, by the Jesuit BOTERO.

However, 'reason of state' and 'state interest' were by no means uniformly or even predominantly understood in a Machiavellian sense in the 16th and 17th centuries. The radicalism of presuppositionless politics met with opposition, depending on how the purpose of the state was valued and to what extent ethical norms were placed above the power drives of the princes.

Botero was the first (1589) to attempt to justify *ragion di stato* in the spirit of reform-Catholic Christian ethics, whose "utility" for the prince was demonstrated, in such a way that it could be reconciled with the teachings of the Church without having to oppose the worldliness of political practice. Yet even this position remained merely a partisan opinion in the turmoil of the times. The interest-bound "reason" allowed for any position to be represented and justified. Thus, 'reason of state' served, under the guise of "new," "scientific" politics, all too easily to legitimize certain political standpoints or goals. For example, the imperial councilor WILHELM FERDINAND VON EFFERHEN, in his work on reason of state (1630), justified for Ferdinand II the necessity of a Catholic-determined unified monarchy in Germany. Against this bogeyman of an *absolutus dominatus* stood ten years later BOGISLAW CHEMNITZ, again with '*ratio status*' in the title, in order to define the Empire as an 'aristocracy' in line with Bodin, to declare the Imperial Diet (with the organ of an estate-based "Imperial Regiment") as the bearer of the sovereignty of the *res publica* of the Empire, whose *ratio status* required the restoration of the *antiquus imperii nostri status* in the spirit of German *libertas*. '*Ratio status*' was thus used here in an anti-absolutist, estate-based, value-laden way, explicitly linked to Bodin's concept of sovereignty, whereby the Imperial Diet and Imperial Regiment were to exercise a strong central power, thus not having to yield in favor of the reason of the individual "states." The territorial states of the Empire were to remain, regardless of their territorial sovereignty, "*status*" (estates) of the "*Imperium Romano-Germanicum*". Behind this was the current intention to bring the rational necessity of the imperial *Respublica* into harmony with that of the Kingdom of Sweden. Although the Empire was not a 'Stat' (state), it still had a *ratio status (imperii)* and was to be understood as a '*res publica*' like Bodin's Kingdom of France.

The *Ratio* of the state was thus universally applicable, not only when it was understood as devoid of meaning, purely political-technical, but also when it was understood as value-laden, seen from the purpose of the state. The publicists of the *Ratio-status* literature then, in the pros and cons of opinions, inevitably resorted to the distinction between "true" (i.e., their own) and "false" reason of state.

The increasing use of the *Ratio-status* concept in Latin before and also after the middle of the 17th century had the effect that the absolute concept of the state entered German publicistic discourse at that time, albeit with expressions of dislike and defense, without being adopted into common German speech.

In Latin texts, the use of the word '*status*' was often accompanied by additions such as *ut dici solet* or *ut vocant*. The jurist GEISLERUS tried in 1656 to prevent the conceptual confusion that, in his opinion, arose from equating '*status*' and '*res publica*'. According to classical word understanding, '*status*' was not *recte* (correctly), but only *oblique* (indirectly) connected with '*res publica*'. *Numquam enim dicitur, quod Status sit Respublica, sed quod sit Reipublicae... Status non est ordo, sed in ordine.* (For it is never said that the State *is* the Commonwealth, but that it *is of* the Commonwealth... The State is not the order, but *in* the order.) But the development could no longer be stopped. As early as 1630, W. F. VON EFFERHEN had written, *de regnorum, repub. vel ut nunc Europa loquitur, status fine*, or: *De fine status seu rerum publicarum*.

The detachment of the word 'Stat' from attributive determinations, even if it did not yet achieve an unambiguous concept, was a decisive step in the direction that from then on became a gradually strengthening line of meaning: the equation of '*res publica*' (*civitas*) and '*status*' (republic and state). The increasingly common association of 'Stat' with the prince's supreme governing authority was a major contributing factor. This led to a conceptual-historical interplay of the terms 'state affairs' (*affaires d'Estat*), 'secret affairs' (*arcana Imperii*, *regni*, etc.), and '*ratio status*', which were typical for Germany in the first half of the 17th century and soon predominated in the burgeoning literature on 'politics' or 'state' from the beginning of the century. The reason and interest of the government required secrecy of "state affairs" from the country of its own *Stände* (estates) and from potential external enemies. Thus, 'Stat' as a 'regiment' of a new kind was distinguished from the 'secret nature of the country.' In the "Political Testament" of the Great Elector of Brandenburg, who, as was customary, spoke of his rule as the "House of Brandenburg" which exercised its "government" over "lands," it was stated (1667) from the perspective of security: "*As for the fortresses in Your lands, upon them rests not only the welfare of Your lands, but also of Your entire State, I therefore command You to the highest degree...*" "Welfare" of the land, the *bonum publicum*, thus appears here as the traditionally respected purpose of a state government; but above it stands the "state" as a policy of "interest," as a security factor through armed force against *Frembden Crohnen* (foreign crowns), between which it was commanded to always stand in *gutter postur* (good posture), to maintain the right *Balance*, and to conclude well-calculated *Alliancen* (alliances).

This perspective of external security contributed decisively after the Peace of Westphalia to valuing the 'state' of the "houses" and "crowns" higher and higher, until it came to the usage and conceptual coinage for which PUFENDORF's *Einleitung zu der Historie der vornehmsten Reiche und Staaten, so itziger Zeit in Europa sich befinden* (Introduction to the History of the Most Distinguished Empires and States Currently in Europe) is representative. But Pufendorf's 'state' among 'states' was by no means established and undisputed in Germany at the end of the 17th century. Despite all the disillusionment from the Thirty Years' War, which continued in the wars of the second half of the century, despite the "sovereignty" granted to the princes of the Empire in 1648, and despite all signs of increasing modernity, the development towards the "modern state" still lagged behind that of the Romance countries. Although the "House of Austria" was a major European power and individual imperial estates such as Bavaria, Brandenburg, and Saxony had weight in the balance of the European system, both the Empire and its "estates" were bound in their traditional constitutions, ways of thinking, and modes of action. Thus, it is understandable that the word 'Stat/Staat' (with or without meaning-giving combinations) remained indeterminate in its semantic field and open to various meanings.

It was often adopted only reluctantly or even explicitly rejected, especially when it came to '*ratio status*'. Characteristically, this term was not Germanized to '*Staatsräson*' at that time. REINKINGK wrote in 1653: "*The Italians call it Ragion del Stato, the French Raison de Estat, in German one cannot properly render it, and it seems that our forefathers, the old rightful Germans... out of innate sincerity and uprightness had an aversion to the abomination, and could not grant it a name.*" The sometimes drastic denigrations of '*ratio status*' are extremely numerous before and after the middle of the 17th century. The concept was measured against old (good) law, religion and morality (*inversus Decalogus* and the *devil's ten commandments*), as well as "German national virtue" in contrast to "foreign immorality."

Illustrative of the reluctant adoption of the word 'Stat' with an uncertain conceptual content are the statements of VEIT LUDWIG VON SECKENDORFF, who came from Franconian nobility and held high official positions at Thuringian-Saxon courts. In his "*Fürsten-Stat*" (Princely State) (1655), he emphasized in the introduction his aversion to the new and dangerous word 'Stat', associated with Machiavelli, with its attendant perverse "cunning that leads to their own and whole countries' downfall, which is nowadays called Stat and Politic." "There is almost no treachery, infamy, and frivolity that is not excused in some perverse places with the Stat, *ratione status* or *Statssachen* (state affairs)." Nevertheless, in his book, beginning with the title, he behaved as he admitted thirty years later in "*Christen-Stat*" (Christian Estate - with a floating meaning of 'Christian stand'). Although he felt disgust at the "not entirely pure or High German word Stat," "since it has become so common and known that it now seems to have well deserved civil rights in our mother tongue, I did not want to reject it, especially since it was used by me, albeit not very willingly, in the *Fürsten-Stat* published 30 years ago, and has now been with me for so long." Thus the word was indeed naturalized, but had not yet become a clearly defined, let alone unanimously recognized, concept. Weinacht summarizes as the result of this stage of conceptual history: the word had become "unavoidable," but remained ambiguous and was "first reflected upon in terms of an internal, then an external concept of unity." In this, everything was connected with "*Stat-Politik* or *Ratio status*." The word moved in the direction of a superordinate political concept, "for rulers and ruled (political commonwealth) and as an umbrella term for different types (*species*) of political commonwealths."

5. Conceptual Change Based on Natural Law

While in Germany the word 'Stat' with its conceptual possibilities had factually concentrated more and more on princely rule, administration, and court, the idea of the 'Stat' of the entire commonwealth, in which the "*populus*", in whatever extent and structure, was included, had not been lost. It even received new nourishment, both from political experience and from the emergence of secular natural law. Both were first combined in the Netherlands, where after the middle of the century the "Political Body, which we call State," was understood as a mutual alliance of interests between regents and subjects.

More clearly, and based on a natural law theory that further developed Hobbes, the contractual character of the *civitas* was established by SAMUEL PUFENDORF, primarily in the 7th book of his Natural Law. Like Hobbes, Pufendorf saw the organization of rule he called 'State' as having arisen from contract law, i.e., through human decision of will, not by divine foundation; but, unlike Hobbes, to explain the origin of the state, he set aside the fictitious state of nature and began, like GROTIUS before him, though still prehistorically fictitious, yet anthropologically more soundly, with the assumption of a "more than natural" form of existence of family units, since the "house fathers" had deemed it necessary for their

security to join together into a *societas civilis*, then to decide on their form of government, and finally, through a contract of submission, to recognize a ruler to whom they pledged obedience (in their own interest), while the ruler was to serve the welfare of the subjects by providing protection (*ad curam communis securitatis et salutis*). In 1682, PUFENDORF vividly reproduced this twofold contractual basis in the German language: "in the first ages of the world, every housefather lived freely for himself... and ruled his wife, children, and servants as if he were sovereign." Only a considerable time after the Flood did the housefathers join together into large societies, which at first had only a small scope. They then elected an outstanding man as judge, colonel, and leader. From such small protective communities, which Pufendorf, referring to Aristotle, calls 'democracy', large empires gradually arose through wars and the subjugation of these small states.

This derivation by Pufendorf is extremely significant for conceptual history. For it shows that from this point on, the theory of the social and submission contract combined with a new Aristotelianism, in which the political union of the houses (*κοινωνία πολιτική*, *societas civilis*, civil society) with its smaller sub-societies was made into the state-constituting political unit. Accordingly, throughout the 18th century, the relationship of '*res publica*', '*civitas*', and '*societas civilis*', maintained from Pufendorf through Christian Wolff to Kant, held true. These three concepts converged to the point of synonymity, although CHRISTIAN WOLFF attempted to distinguish conceptually between '*res publica*' ('republic') and '*civitas*' ('state').

6. 'Princely State' and '*societas civilis*' (18th c.)

To want to comprehend the '*societas civilis*' as 'state' (*'civitas'*) was indeed fraught with contradictions, both empirically and logically. That synonymity was possible at all indicates the ambiguity and openness of the word 'state' even for the entire 18th century. It is a sign of the still existing variety of usage that 'state' (*'civitas'*) on the one hand was traditionally the structured "civil union" of "houses," but on the other hand was understood as an "institution," 'princely state', 'well-regulated estate', 'machine'.

The word could thus encompass political reality from two opposing, but not mutually exclusive, approaches. While the political literature of the 17th/18th centuries always emphasized the dichotomy of 'regents' and 'subjects', they were far from being a sum of equal individuals in terms of constitutional law, or even what was later called a 'society of citizens'. They were rather a society of families, varied in their rights and freedoms, composed of nobility, bourgeoisie, and peasantry, which in its entirety was named '*societas civilis*'. It was autonomous in its members or groups to varying extents, and yet subject to the authority of the prince, his administration, and his officials distributed throughout the territory." This described the state from above, which was stretched like a net over "land and people" and inserted itself with its own property (domains, mines, manufactories) into the structure of the independent economic units of the nobility, town burghers, and peasants.

From the beginning of the 1720s, CHRISTIAN WOLFF attempted to theoretically grasp the reality of the intensifying princely state, in the natural-law-Aristotelian tradition of Grotius, Leibniz, and Pufendorf, and to give it a normative-ethical foundation with the dual final purpose of the political commonwealth: common welfare and security. Wolff aligns himself with the traditional chain of the relationship, extending to identity, between '*civitas*' and '*societas civilis*'. However, his terminological hesitation regarding the general advance of the word 'state' is revealing. Especially in the preface, but also here and

there in the subsequent chapters of his early work (1721), 'commonwealth' was repeatedly interchanged with 'state', but apparently not yet completely equated. It is noticeable that 'state' is used and specially noted in the index when it concerns financial policy: "how to keep money in a country,... that more money comes into the country, if the state is to become more powerful." 'General commonwealth' is still the preferred term, and in Wolff's core sentence: "The common welfare... and security is the highest and final law in the common wealth," there is no mention of 'state'. In 1721, characteristically, the consideration of an entire state above provinces and cities is also emphasized, whereby the entire Holy Roman Empire of the German Nation is to be regarded as one state. After 1740, Wolff favored the word 'state' more strongly, without, however, going beyond his Aristotelian-natural-law concept formation. The socially connected multitude of "houses," which had united *ad vitae necessitatem, commoditatem ac jucunditatem* (for the necessity, convenience, and enjoyment of life), is called *civitas*, in the native idiom a *Staat*. From this, however, Wolff explicitly distinguished the concept of '*res publica*', equating it with the constitution of a 'state': "The constitution of a state is called the commonwealth (*respublica*)." "Although some consider the state and the commonwealth to be one and the same, this is done wrongly; for the contract by which a state is established is different from its constitution, in which the means to achieve the purpose of the state are determined. For from the former the state does not yet receive its specific form (*forma specifica*), but from the latter."

Wolff, with his increasing use of the word and concept of 'state' compared to 1721, went as far as was possible in Germany around 1740/50. ZEDLER's lexicon, with its articles "Republick, das gemeine Wesen" (Republic, the commonwealth) (1742) and "Staat" (State) (1744), lags behind and shows even less decisiveness than Wolff. The traditionally unproblematic keyword "Republick" receives nine columns. In contrast, the articles "Staat, Stand" (State, Estate) and "Staat oder Etat" (State or Estate) are together not even granted a single column, and they are followed by short articles of only a few lines each with word combinations that indicate the current variety of understanding of the still not fully naturalized and clearly defined word: 1) Civil-Staat... properly the constitution of a state or republic in contrast to the Militair-Staat; it generally includes all so-called civil servants; 2) Hof-Staat (Court); 3) Kirchen-Staat (Church-State), i.e., the constitution of a state or republic with regard to public religious exercises as well as churches, schools, charitable foundations; 4) Kriegs-Staat or Militair-Staat (War-State or Military-State), i.e., the constitution concerning worrisome military campaigns or during a war; 5) Reichs-Staat (Imperial State); Schulen-Staat (School-State), belonging to the Church-State; 6) See-Staat (Naval-State), i.e., the constitution concerning naval power. Linguistically, the meaning 'state/estate' was thus used to designate the "constitution" or condition of a specific area of public government and administration, with all these areas being summarized under the umbrella term 'state', understood as equivalent to 'republic'. This latter, however, Zedler stated with distance, is "commonly, especially among publicists and political experts, defined as the government or the form of government and constitution between authority and subjects of a country." It explicitly points to the semantic proximity to 'estate/estates' and mentions the term General-Staaten (States-General) of the United Netherlands. In addition, designations such as Hof-, Kriegs-, Cammer-Staat (Court-, War-, Chamber-State) or word meanings like "to lead a magnificent state" are mentioned. The Staats-Dame (lady of state) is explained as a person of rank of the female sex, while for Staats-Mann (statesman) the word 'state' is primarily related to governmental affairs.

In the detailed article "Republick, das gemeine Wesen" (Republic, the commonwealth), the introductory definition of the commonwealth includes '*civitas*' but avoids 'state'. This, however, cannot be maintained

in the last part of the article, which deals with the contractual basis and constitution of republics. Without transition, the author switches to the concept of 'state' where it comes to current affairs, and lets 'republic' recede. It is not discernible that 'state' and 'republic' are differentiated which also corresponds to HÜBNER's lexicon, where it is noted for 'state': "Lat. *Respublica*, *Status publicus*, or a commonwealth, is in itself a large society, in which one finds authorities and subjects."

The more the state's administrative organization expanded, branched out, and penetrated the country, the more a self-awareness of the princely servants developed, and with it an autonomization and depersonalization of the administrative state, so that a distinction was made between the person of the regent and the 'state'. Thus, for example, in 1680 the Duke of Württemberg decided in a dispute over the assumption of debts that this could be expected "neither of the state nor of Us ourselves." 'The prince and his state' became a topos, and so it was consistent that the prince—not just with FREDERICK II—became the "first servant of his state."

The service of the prince and his officials to the state was seen in the functional mechanism of rationalized administration. 'State' was conceived technically-functionally with the help of the machine metaphor, for example by JOHANN HEINRICH GOTTLOB VON JUSTI (1758): "A well-ordered state must be perfectly similar to a machine, where all wheels and gears fit together most precisely; and the regent must be the master craftsman, the first mover or the soul, if one may say so, who sets everything in motion."

Justi himself repeatedly provides indications that the 'machine-state' did not stand in opposition to the ancient, now adapted to the terminology of the century, state purpose of the *bonum commune*, the common good, the welfare of the country and the people. Typically for the time, this final purpose of the state was expressed in the equally ancient Greek philosophical, now fashionably overgrown concept of 'happiness' (*Glückseligkeit*, εὐδαιμονία, *felicitas*). Its Christian connotation still resonated when, applied to civil society or the state, it was brought to bear in a eudaemonistically secularized way. The machine of the state was supposed to bring tranquility through security and thus help to achieve satisfying happiness. For Justi, in whose work the state-related concept of happiness culminated, "the final purpose of a state lies in the common happiness of the subjects and of the entire state," which he understood as the "union of the wills and forces of its citizens." Thus he could speak of the "happiness of a state," which he, combined with power, presented as the "common best."

That the state as a well-functioning, happiness-securing institution could only be an absolute princely state if it did not want to endanger its purposive rationality, remained self-evident. Theoretically, however, it was conceded that '*Respublica*' or 'state' was an umbrella term for all forms of government, including and with emphasis for democracy, as with PUFENDORF and WOLFF.

Pufendorf, in accordance with the German conditions, gave monarchy the factually exclusive precedence. From the contract of submission, which imposed rights and duties on both sides, he did not draw the consequence that was later drawn in America, invoking him. Christian Wolff went much further, at considerable risk, when he (1721) recommended "the polity or a free republic," later at least a *Respublica mixta*, as the best form of government, without, however, using the word 'state' in these passages.

7. 'State Territory'

The criteria of the 'Stat' or 'State', which was replacing '*res publica*' and rendering '*civitas*', must be supplemented, next to the areas of the personal—better: house-association—and the administrative organization, by the aspect of space. To be sure, the linearly sharply defined state territory in the sense of the state doctrine of the 19th century was not yet established until the end of the 18th century. But it is certain that a specific spatial conception entered into the personally conceived sovereignty of command ("Gebiete"), at the latest since the 15th/16th century. And '*terra*', '*territorium*', 'Land' have since then increasingly also taken on the character of a relatively definable area. Borders were drawn, for example after 1422 in the wilderness between Prussia and Polish-Masovia. Thus arose spaces of rule, which the emerging geography took up. In a "State Geography" of the year 1687, it was said in the introduction: "(The book) was given the title of a German State Geography for no other reason than that the borders of every state in Europe, their distinction from others, were clearly set, their provinces, places, government, affairs, revenues, and the like were presented." Even more clearly, 'kingdom' was defined in 1697 as "a large extent of land, consisting of different provinces subject to one prince." The spatial basis must therefore be taken into account in the 18th century when speaking of the 'state'. Cameralism reinforced the weight of space.

8. Concept and Usage before the Later Natural Law and the Revolution

The word, which increasingly showed signs of a Germanization distinct from '*status*'—it was more and more often written 'Staat'—still offered various possibilities of use and had therefore not yet attained a universally valid, unambiguous meaning, but had been gradually sharpened conceptually through "politics" ('*ratio status*', 'interest'), through the natural law contract model introduced into public law (*jus publicum*), through cameralism and eudaemonism. Prince and subjects (house fathers), central and local administration, organization of power (*puissance*) through military and financial budget, usable land area within borders—all this could be highlighted individually, but also merge together, so that the word could express a comprehensive concept. 'State' was pluralized as a type. Europe consisted of 'states' or 'powers' in the 'balance' of its 'system'. However, it still remained in a certain state of suspension whether the monarchies of the time *were* 'states', or whether they *had* a 'state', and whether their 'state' was to be seen as a unity, yet at the same time composed of 'states'—'estates', 'provinces' = 'lands'. The body metaphor could still be used. In FREDERICK II's "Political Testament" of 1752, for example, it says: "*Les nombreuses provinces qui forment l'État*" (The numerous provinces that form the state). In 1777, Frederick wrote: "*Le souverain est attaché par des liens indissolubles au corps de l'État... Le souverain représente l'État; lui et ses peuples ne forment qu'un corps, qui ne peut être heureux qu'autant que la concorde les unit*" (The sovereign is attached by indissoluble ties to the body of the state... The sovereign represents the state; he and his peoples form but one body, which can only be happy as long as concord unites them).

In these easily multiplied quotations of the time, it is repeatedly expressed how strongly 'état' and 'Staat' were made independent, objectified, and distinguished from the prince or the '*maison*' (of Austria, of Brandenburg, etc.). This process, which affected everyday political language, can also be demonstrated in political-juridical theory, going beyond Grotius and Hobbes, through Pufendorf in the development of the concept of state personality. PUFENDORF coined the concept of the '*persona moralis*', i.e., of man ('*ens morale*') as a legal subject, extended to the '*persona moralis composita*' when several individuals are joined together into a unified community of will, especially into the state (*civitas*). It is defined as *persona moralis composita, cujus voluntas, ex plurium pactis implicata et unita, pro voluntate omnium habetur, ut*

singulorum viribus et facultatibus ad pacem et securitatem communem uti possit (a composite moral person, whose will, implicated and united by the pacts of many, is held as the will of all, so that it can use the strengths and faculties of individuals for common peace and security). This legal (international law) subject, the state, is based on the social and submission contract, but expresses its will, as is evident from the context of Pufendorf's works, solely through the sovereign monarch (in the name of the subjects). The organ of rule and the personality of the state are therefore identical. Pufendorf's concept was decisively influential in German state thought of the 18th century. It corresponded to the theory and practice of the German development towards the state.

Pufendorf's "*De officio hominis et civis*" also served as the basis for the instruction of Archduke Joseph, as was explicitly prescribed in the imperial order (1754)—an indication of the recognition that Pufendorf's "Natural Law and Law of Nations" had gained and retained in the 18th century. In the lectures that CHRISTIAN AUGUST VON BECK held for the Archduke in German, Pufendorf's concept is always rendered with 'state' as a matter of course, and '*jus publicum*' has become 'state law', with Beck defining: "The general state law... determines the rights and duties between a regent and his subjects, consequently their mutual obligations, according to the fundamental constitution of a state," which in each case has its own particular state law. For the German Empire, where "the ruler is not sovereign," its fundamental constitution was to be guaranteed by state law. Overall, the concept of the state seems to be fully developed in Beck's work, internally in state law, externally through the law of nations. This is evidenced by the sentence: "One should consider the world as a large body and the various states as its members. For as precise as the connection of the members is in the structure of man, so firm is the connection of peoples both in terms of commerce and of mutual aid." The "*Jus naturae et gentium*" thus fitted the worldview of the Europeans. States were equated with peoples or nations. A world of "united nations" (states) was prefigured.

A decade later, the rector of the University of Tübingen, in his lecture on German state law and in the dissertation written with his student NESTEL on the true concept of the word 'state', reflected on why the designation '*jus publicum*' had been replaced by 'state law', which "at the time when I learned it, was almost completely unknown." HOFFMANN believed that the new compound was not permissible for a long time, since the word was not respected due to the hated *ratio status*, or the long-notorious (false) political cunning. But now—at a time, it may be added, of increasing appreciation for the welfare-guaranteeing state—these concerns were obsolete, and it was conversely necessary to avoid the word '*jus publicum*', since it had a republican origin that pointed to the *majestas populi*. Although a "republic," for which Hoffmann introduces the newly used word "Freystaat" (free state), is also a state. But with great determination, the Tübingen professor spoke out for the view of the state that was practically valid in Germany and solely affirmed by him. It is quoted here in conclusion because in these sentences the small world of the Imperial estates, the territorial states with their "majesty rights," is aptly reproduced, and thus the concept of the state of the average German around the middle of the 18th century is captured: The state was comprehensively "the common civil being," but "primarily only with respect to the ruler." "The other part of a civil society, the obedient, the subjects, are indeed also included in the concept of a or the state, inasmuch as without them no regent, no government can be conceived... But since the subjects belong here only insofar as they are governed, the phrase, 'the state', in most of its associated words, nevertheless refers to the government and everything that belongs to it."

WERNER CONZE

III. 'State' in the Age of Revolutionary Movement

1. The Regulative Superordinate Concept

The semantics of the word 'state' and its word field change in spurts and quickly at the time of the French Revolution. Only now does the word in German acquire the character of a fundamental concept that cannot be replaced by any other expression. FICHTE: "More has been written, read, and spoken about nothing, especially in the epoch we are living through, than about the state." SCHLÖZER even considered 'Stat' a core German word that did not exist as such abroad, and the BROCKHAUS correctly asserts in 1840 that "the concept of the modern state itself has only developed more recognizably and independently from its... historical presuppositions in more recent times."

What has been said here about the context, the word, and the concept of the state always indicates the elevation to a guiding concept, without which the modern experience in the field of tension between revolution and reform could not be processed.

a) 'State' as an underivable subject of action. What was already hinted at in the 18th century—that 'state' spanned and summarized dualistic formulas like 'prince and people' or 'prince and land' or 'prince and civil society'—becomes a self-evident, though never undisputed, concept since the revolution. While 'state' before 1770 was a word that opened up completely different factual situations in differing contexts through respective definitions—from the state as pomp and expenditure, through the state as an estate or a condition, to the court or princely state—this plurivalent, additively usable word rose to become a central superordinate concept, from which the entire political and social constitutional life could be mentally and factually administratively organized. Since then, 'state' has gained a character of exclusivity that pushes back all other word meanings, in complete contrast to English, for example, where 'state' can still also mean 'condition'.

'State' simultaneously becomes a collective singular of many individual determinations, without which the 'state as such' cannot be conceived. 'State territory', 'state populace', and 'state power' are only minimal legal determinations, to which numerous others can be added depending on the perspective. It characterizes the general acceptance of the now innovative concept that it, precisely as a superordinate concept, becomes in need of and obligatory for definition. Through additional determinations—which did not exist before—the 'state as such' gains its concrete content, whereby other contents are pushed back or excluded. Since then, 'state' is no longer used pluralistically; rather, the uniquely given superordinate concept is now specified in various ways, as a 'machine state', as a 'Rechtsstaat' (rule-of-law state), as a 'Kulturstaat' (cultural state), as a 'Vernunftstaat' (rational state), as a 'Machtstaat' (power state), later also as a 'Sozialstaat' (social state), to name just a few, sometimes mutually exclusive, descriptions. In other words, to apply a criterion of the "Sattelzeit" (saddle period), the state has been drawn into partisan perspectives since the French Revolution, and is thus politicized and thereby also made ideologizable. As BRUNO BAUER polemically formulated it in 1841 with the usual claim to exclusivity: "Adjectives can no longer exhaustively describe the concept of the state... whoever wants to call the modern state 'the Christian one' gives others permission to call it the philosophical, etc. In truth, it can only be comprehended if it is conceived as the objective existence of the universality of liberated self-consciousness"—whereby he again exposed himself to a round of criticism from Stahl to Marx.

The natural law and baroque doctrine of the state knew the state as a moral and legal person, which was only capable of acting effectively as such. But the political capacity to act internally and externally, where states appeared as '*puissances*' or as 'powers', always depended on the sovereign who represented the state. The monarch or the governing college were visible actors, in whom the juridical, executive, and legislative state power was gathered. In this sense, FREDERICK THE GREAT repeated: "the ruler represents the state... The prince is to the state he governs what the head is to the body: he must see, think, and act for the whole." Similarly, JOSEPH II spoke of his 'duty' and 'loyalty', "which I have dedicated to the State in all my actions for my entire life," which is why he also admonishes his state officials not to seek personal business in their service: "Whoever wants to serve the State, and serves it, must completely set himself aside."

The state, as it were an institutionalized common good, from which the rights and duties of all estates and individuals are determined, had not yet been made independent into an autonomous subject of action. Only since the late Enlightenment does the state itself become, as it were, a real person; its legal construction or the body metaphor are taken literally. 'State' as a concept rises to become an autonomous subject of action. Thus, in the Prussian General State Law (ALR), the sovereign, the de facto and de jure ruling monarch, is no longer named as such, just as the king or majesty do not appear in the legal text. Rather, he enters into a functional determination, to be the "head of the state," or even less: the "head *in* the state." From the head of the state—semantic irony?—becomes the state in general and itself the bearer of rights and duties. As it was said in a work of the late Enlightenment to justify freedom of the press: "Every man is prince and subject of the state."

In this linguistic turn lay more than just a legal personification; it contained a republican point that already presupposes the state as an overarching subject of action. The metaphor became its own concept, which was quickly taken up by the revolutionary side to vindicate an all-encompassing claim for the state. In 1798, the young GÖRRES distinguished the "matter" of a state—"the sum of all individuals united in it"—from its "form": "it is the union of all partial personalities into a universal personality, its purpose is the "common good." And ADAM MÜLLER followed, politically conservative but semantically analogous: "The state is the totality of human affairs, their connection into a living whole." For FICHTE, it is the state alone "that unites an indefinite number of people into a closed whole, into an allness."

Across most political camps, the way was thus opened that, from the experience of the revolution, appealed to the sovereignty of the state; "it is the true, absolute final purpose," which also bound the monarch, in order to realize the necessary reforms through an enhanced statehood. This state, in HEGEL's words, mediating the "general interest with the particular interests," gains an "abstract reality." "But a will guided by educated knowledge and a concrete action resulting from it are its modes of execution." No wonder that the monarch's task of putting the final dot on the 'i' fades in such a self-aware state. ALBRECHT, one of the Göttingen Seven, defined the head of state merely as a "state organ." The millennia-old body metaphor had lost its referential character.

It was the organism metaphor, unlocked by Kant, that so interlinked and referred the whole and the parts, ends and means, that it allowed the sovereign state to be understood as an acting personality as a final linguistic instance. "State life," as KRUG emphasized against the doctrines of the preceding century, "is not life *in* the state or *for* the state, but the life of the state itself as a great organic body." With the help of

the organism concept, a historically autonomous final instance was also introduced, which has since characterized the concept of the state in German.

Thus, RANKE, who avoided the organism metaphor, saw in the states "individualities," not emanations of the "real-spiritual" deducible from the general, "which in unforeseen originality suddenly stands before your eyes," which could not be derived from any higher principle.

But even where supra-state, rational, or historico-philosophically deduced goals flowed into its determination, the state remained a no longer derivable, genuine subject of action. In DAHLMANN's words: "For the state is not merely something common among men, not merely something independent; it is at the same time something that has grown together, a physically and spiritually united personality." Or in ZOEPFL's widely effective state law: "Precisely for this reason, however, because the state carries the legal ground of its existence within itself (in its rationality), it also possesses, as a living organism, personality, namely the quality of a so-called moral or legal person, and that in the highest degree," i.e., "it is an absolute or sovereign commonwealth," thus, as he adds, "justified by itself." In this, he could appeal to the authority of SAVIGNY: "Only in the state does the people receive true personality, thus the capacity to act." With the now faded metaphor of the new concept of the organism, a semantic pre-decision was accepted that became politically widely effective. The smoldering conflict between the monarchical principle and popular sovereignty was defused or suspended in favor of state sovereignty. Thus, "the state," in ZOEPFL's neutralizing phrase, "appears in its essence as something ruling over the individual." To this extent, the differentiated sphere of civil society was also incorporated into the state as an organism, if not more extensively subjected to its organizational power. The enormous increase in power that the state had gained through the consequences of the French Revolution was brought to its—also empirically redeemable at any time—concept by 'state' as the ultimate subject of action.

b) The Temporalization of the Concept of the State. A second generally presupposed criterion lies in the temporalization of the concept. Although the concept of the state, from its security and order function as well as from its constant purpose of the general welfare, had a semantic presumption of being understood as rather static, this finding also changed fundamentally since and by virtue of the French Revolution. The concept gained a temporal internal structure that asymmetrically related past and future to each other. The concept indicated a dynamic that was supposed to force the state, precisely as a subject of action, to organize, to innovate, to reform, and even more, to progress. And insofar as the organism was emphasized, this state also possessed an inherent formative drive to constantly develop and unfold. The progress to be organized and the organically conceived development referred to each other, each with different emphasis.

"The state that succeeds in grasping the true spirit of the age and in quietly working itself into that world plan (of Providence) through the wisdom of its government, without the need for violent convulsions, has undoubtedly great advantages. It works away the powerless, the obsolete, and gathers new forces for further progress."

Already VATTEL, who defined the society united into a nation as an état souverain, had in 1758 granted this state-nation the right not only to "establish" (former) its constitution, but also to "change" (changer) and "perfect" (perfectionner) it according to the situation. With this, a principle derived from natural law and history was formulated, which was realized since the French Revolution, to which Kant cautiously,

and Fichte openly, agreed. Natural law maxims for securing liberal postulates and historical real factors, which also pushed for the dismantling of estate privileges, gave the state an organizational competence and a political dynamic that cut across all political and social camps and was demanded, accepted, or criticized depending on who was affected. While hardly any more natural law norms, as still in the General State Law (ALR), were defined into legislation as purposes, liberal natural law drafts still ran critically alongside the emerging written state constitutions well into the 19th century. By pointing out their deficit in civil liberty and co-determination, they put the states under pressure to change, because, in KRUG's words, "the state in reality (the real state) is not yet equal to the state in the idea (the ideal state)." Specific to German usage, however, were the historico-philosophical and idealistically developed state drafts, which, projected into the future as a historical mission, were supposed to transpose the empirical state in the direction of an ideal state. The concept 'state' thus gained a temporal dual aspect: partly a theoretical anticipation, partly a critical inventory of the real states, its evidence drew from their historico-philosophical mediation.

An indication of this turn was the indignant rejection of the machine metaphor, which SCHLÖZER could still use positively in 1793 as the last: "The state is an invention, like a fire insurance fund serving the common good. The most instructive way to treat the study of the state is to treat the state as an artificial, exceedingly complex machine." Behind this was now seen the absolutist system, which, controlled from the outside, was at most repairable, but not capable of change from within, which degrades the citizen as a subject to a cog in the clockwork, without granting him freedom for development.

The rejection of the machine state, in the wake of the revolution, ranged from right to left, whether it was that it suffocated the self-determination of the individual, that it drove people into alienation, or that it destroyed the traditional estate-based order. In the summarizing words of BRANDES: "But the more the idea that the state is a machine is practically realized, the more the apparent perfection produces the greatest, irreplaceable evils in the suffocation of one's own power of thought and one's own activity, which no drillmaster can teach, without which no estate can well exist, and the suffocation of which, in times of need coming to every state, will press upon it with the weight of a hundredweight." As NOVALIS exclaimed before him: "If this machine could be transformed into a living, autonomous being, the great problem would be solved."

German philosophers and state theorists worked relentlessly from 1780 to 1848 on solving this problem, while their historico-philosophical heritage, in the age of increasing positivization of state law, was primarily cultivated in the camp of social democracy.

c) 'State' in a Historico-Philosophical Perspective. As much as state theories since Kant remained embedded in historico-philosophical systems, they also influenced the semantics of our concept. Formerly quasi-permanent natural law maxims are now cast into temporal perspectives as historically necessary, as unique tasks, but at the same time derived from eternal reason and systematically justified.

"There is a theory of state law, without agreement with which no practice is valid." When KANT defined the empirical state (*civitas*) as the "union of a multitude of men under laws of right," his line of argument aimed at deriving the "laws of right... as... a priori necessary" from the "form of a state in general, i.e., from the state in the idea." This form could only be republican, binding for everyone in the same way; it served as a guideline for all political action in order to realize a general and equal system of law that

could be mutually agreed upon by everyone, which is why the regent also remained subject to its laws. The concept of the state thus gained an inherent postulatory future dimension. By the "welfare of the state," Kant understood "the condition of the greatest conformity of the constitution with principles of right... as that towards which reason, through a categorical imperative, obliges us to strive." From this "rule-of-law" concept followed an anticipation that was taken up by the language of the reform-minded officials. Every state was under pressure to reform as long as it still permitted injustices that contradicted the principles of freedom and equality. The "right of the state, indeed the duty of the same to change," thus extended to all estate-based, social, and political institutions that, as privileged, were not equally consensual for everyone: to the abolition of corporations, hereditary nobility, servitude, church property, entails, and majorats, etc. In short, the reform program of the Prussian state, which had to change itself, was justified both theoretically in terms of legal theory and historico-philosophically.

The form of government also came under pressure for change, however much Kant had provided the once legitimized path to a republic with separation of powers with legal barriers. In effect, the temporal internal structure of the concept 'state' had revolutionary consequences. They were also openly stated. The Berlin lexicographers, for example, translated the neologism '*Contre-Révolutionnaire*' in 1800 simply as '*Staatsfeind*' (enemy of the state), i.e., a friend of the state had to be a revolutionary. The young FRIEDRICH SCHLEGEL in 1796 sketched a historical series of concepts that led from the despotic anti-state through the imperfect quasi-state to the true state of a democratic republic, which could only be reached in an endless approximation. And the young GÖRRES drew the consequence under international law. He developed a complicated scale on which the victorious "normal states," if they are republican (i.e., France), have a permanent right of intervention over the defeated "regulative states," as long as these (like the coalition states) are still despotic. This right is staggered in time; it does not apply in the reverse direction. The "free states" receive the authority "to increase their power as much as possible, in order to establish a state of nations through a general republicanization of the existing monarchies."

It was FICHTE whose transcendental justification of the right to revolution added new valences to the semantics of the state. In the sequence of his writings, the 'state' gained ever more positions in order to realize the old goal of the French Revolution, 'freedom', as a historical mission. In 1793, arguing from the perspective of the autonomous human being, it was still said: "No state constitution is unchangeable... A bad one, which conflicts with the necessary final purpose of all state associations, must be changed; a good one, which promotes it, changes itself." In the "*Closed Commercial State*" of 1800, the state, purely semantically, takes the leading part in order to prevent any social injustice internally and any exploitation of other peoples externally. "The real state... can do no more than gradually approach the rational state. It can therefore be conceived as being in the process of the gradual establishment of the rational state." Even if Fichte grants this state only legal, not moral tasks, it acquires, going beyond Kant, the character of a "compulsory institution" as an "absolute state," in which "all individuals, without a single exception, are claimed." "The absolute state is... an artificial institution to direct all individual forces to the life of the species and to merge them therein." Precisely its historico-philosophical task, which points beyond itself, gives this state a total claim.

What in the French semantics of the sovereign nation and in the early Fichte was attributed to the autonomous self and its contract-bound society, or Jacobinically to the *peuple* as sovereign of the *république*, is now taken over by the 'state'. FORSTER stated emphatically in 1793/94: "'That the royal dignity is abolished in France.' This declaration is the epoch of the salvation and rebirth of the entire

state." For FICHTE, this state becomes a future-oriented concept guiding action. "The state, in itself an invisible concept," is only realized when the educated rulers, "who have a right to compel the reluctant," and the ruled, all working together as citizens, bring it forth. "Only the result... do we call state, in the strict sense of the word." The real state is thus expected to become an "educational state," whereby Fichte left no doubt that it had to realize humanity within itself, that it had to serve the superordinate purpose of "culture." Even in the "*Addresses to the German Nation*," the chosen national state remains bound to the historical mission of leading out of the third of five ages, that of "perfected sinfulness": with a salvation-historical coercive character that, in modern terms, gives it totalitarian features: "It has the perfect right... to compel the... immature... to their salvation." Once compelled to moral insight, its citizens would be ready to sacrifice themselves to this state, in contrast to the immoral military state of the past, which pressed its mercenaries into service. Universal military service and universal compulsory education (both legally anchored in Prussia) were thus legitimized, as it were, with a salvation-historical overlay.

A completely different, though no less influential consequence in terms of educational history, was drawn by SCHILLER from Kant's postulate to realize a state appropriate to reason. In an equally close engagement with the French Revolution as with the German conditions, he asked himself whether "the state, as it is now constituted," could abolish the alienation into which man had fallen thanks to civilization. His answer is No. For the "state of necessity," which restrains human drives, had itself produced those evils that prevented a moralization of the citizens. Neither the "dynamic state of rights," which tames man's forces, nor the "ethical state of duties," which fetters his will, leads to that freedom in which alone senses and reason can unite in a manner worthy of man. Only in the self-contained "aesthetic state" of sociability, beauty, the arts, and play does man find himself free with his equals; here "there may only be victors, but no vanquished." Only in the "realm of aesthetic appearance" is the ideal of equality fulfilled, for which one strives in vain in reality. But the aesthetic state is indeed capable of pointing the way for man, indirectly educating him, to make a free state of reason possible. Thus, for Schiller, between the empirical and the ideal rational state, there is interposed that aesthetic state which does not force human self-realization into a direct educational mission, but refers it to an apolitical, a only potentially political, detour: a model for the German educated middle class (*Bildungsbürgertum*).

It was precisely for this situation that his friend Wilhelm von HUMBOLDT designed a consistently liberal state constitution, which, through legal restraint, opens up a space for the individual to unfold his individual energies and forces, in order to mediate and join together sensuality and reason through his own work, through arts and self-cultivation. This state, following a negative principle, was only to provide for security: "that the state must absolutely refrain from all efforts to influence the morals and character of the nation directly or indirectly, other than insofar as this is unavoidable as a natural, self-arising consequence of its other absolutely necessary measures, and that everything that can promote this intention, especially all special supervision of education, religious institutions, luxury laws, etc., lies absolutely outside the limits of its effectiveness." Even this liberal state, which TREITSCHKE later said was reduced to "night-watchman services," was for HUMBOLDT only a future state. In every reform that realized it, the consequential burdens had to be considered, for "a form once given cannot transform into any other self-chosen one." As far as possible, therefore, every reform had to "proceed from the ideas and minds of the people," and, according to its own premises, could not be forced.

While Humboldt had incorporated minimal, yet indispensable, institutional guarantees into his liberal state model to enable the extra-state freedom of individuals, the early Romantics drew the opposite consequence from Schiller's aesthetic offer. Devoid of any legally redeemable conception, they transcendentally-poetically designed a "poetic state" in which the political and aesthetic dimensions of man were ideally supposed to coincide. "The need for a state is the most urgent need of a human being. To become and remain human, he needs a state," wrote NOVALIS, in order to measure the space in which the demands of the revolution could be fulfilled, in a "republic that is a philosophical state," in which "every citizen... is a state official" and in which "all men become capable of enthronement." This state is a "work of art" that lives from the "representation of the non-present," from the "miraculous power of fiction," in which love and faith come together: "It is an emanation of the spirit. The spirit is always poetic. The poetic state is the true, perfect state... The more spirit and spiritual intercourse there is in the state, the more it will approach the poetic—the more joyfully everyone in it will, out of love for the beautiful, great individual (i.e., the state, R. K.), limit his claims and want to make the necessary sacrifices—the less the state will need it."

The 'state' of the early Romantics, like Fichte's, acquires a comprehensive claim, "total" features. To the extent, however, that it renounces institutional and empirical givens from which it would have to unfold, this is a completely utopian concept. The fulfillment of the revolutionary postulates is thought of as "poetic," i.e., as "thinkable and therefore as feasible," without reflecting on the empirical implementation, as Kant and Humboldt had done theoretically.

Seemingly only related to reality, ADAM MÜLLER argued, without renouncing the romantic total claim of the state, which his predecessors had designed merely as a poetic counter-image. "The state is not a mere manufactory, dairy, insurance institution, or mercantile society; it is the intimate connection of the entire physical and spiritual needs, the entire physical and spiritual wealth, the entire inner and outer life of a nation, into a great, energetic, infinitely moving and living whole Nation, into a great, energetic, infinitely moving and living whole." Despite this all-encompassing definition, Müller insisted that "there is no concept of this state." Concepts were "dead and useless,... they stand still, while the state progresses into infinity." The state is contaminated with life itself, with movement as such; but this finding can—thanks to Burke—only be grasped "by the power of the living idea." As much as this semantic evasion from the situational concept to the moving idea articulated the difficulties into which all state theory had fallen under the pressure of temporal change, so little did Müller adhere to his redefinition. In 1819, he recurred to an "original concept of the state," which he believed to find again in the past, "pre-state" word meaning of "situation, condition, or estate." By virtue of this seemingly historical justification, it was then possible for him to interpret all social and all political relations as at once estate-based and state-based. "In sum: man is state within the state: *status in statu*," the basic sentence of his corporate-state speculations.

Only now can it be said that the revolutionary potential of the romantic theory of the state has been exhausted. It was now directed, conservatively, against the doctrine of state sovereignty and against all institutional guarantees that the then-existing institutional state was supposed to uphold on its own.

All the concepts of the state described so far have two things in common: first, they draw on the temporal difference-determination that confronts the present state with the ideal state, whereby the entire history up to now is invoked to substantiate the diagnosis of the times: be it that a linear or spiral progress is

assumed, which must now accelerate (Kant), be it that three-phase theories are developed (Schiller, early Romantics) or a five-age theory (Fichte), or be it that past and future, mutually illuminating, are related to each other in a unique present (Novalis): it is always a matter of reflexive determinations that place the critical turning point from the empirical to the ideal state in their own age of the French Revolution. Second, none of these state theories, except for Kant's, whose *Metaphysics of Morals* was explicitly developed against the Prussian General State Law, took the existing legal situation or the concrete diversity of the German states, which had inherited the dissolving Empire, as the starting point of their analysis.

In this, German state semantics differs fundamentally from the French, which since 1789 could start from the premise of a 'nation' in order to speak of the 'republic'. The only philosopher of history who had included political reality and its institutional givens in the reflection of his concept of the state was HEGEL.

His then-unpublished youthful work on the constitution of the German Empire, from 1800, began with the lapidary (from today's perspective, ahistorical) statement: "Germany is no longer a state." State law had become an "empirical description," no longer a "science." "What can no longer be comprehended, is no more." And Hegel scathingly criticized the Germans' habit of holding on to their concepts, even when they are no longer suitable for grasping reality. For "between the events and the free conception of them, they insert a multitude of concepts and purposes and demand that what happens should be in accordance with them. If this is not the case, they find in their assertion of their concepts the right to bitterly censure what has happened. Therefore, their way of speaking merely from their concepts is untrue and dishonest."

Hegel analyzes the dissolving imperial constitution and comes to the conclusion that, despite all love of freedom and all traditional legal consciousness, the German Empire is not a state because it lacks the power to realize right and freedom (in the sense of the French Revolution). "Germany is a state... in thought and not a state in reality... The system of the thought-state is the organization of a legal constitution which has no power in that which belongs to the essence of a state." With this, Hegel offered an analysis of reality and brought to a negative concept what—seen from a sociology of knowledge perspective—had entered unhindered and unbroken into all future drafts of idealist and romantic state theories, namely, being powerless in terms of legal and political practice. In return, Hegel's entire effort now aimed at integrating the weight of the givens and the politically necessary power of a sovereign state into the concept of his rational state. In this, he too started from the temporal difference-determination that always points ahead to a future state of reason. As his famous is-statement, that "the rational is real" and vice versa, initially read: "What is rational, becomes real, and the real becomes rational."

Hegel also designed a three-phase philosophy of history, whose epochal shifts increasingly realize the freedom of all men. And when he considers the 'state' as the "pioneer of freedom," he leaves no doubt that the empirical state is never the final instance of world history. Rather, it is the "general idea of the state as a genus" that "exercises an absolute power against the individual states" in order to realize freedom through the states. Of course, without states as institutional guarantors, there is no freedom at all. "The state is the reality of concrete freedom." Since the French Revolution, it has been the "principle of modern states" to simultaneously presuppose and secure the independence of individuals in the substantial unity of the state." Hegel's analysis thus aimed at relating the concept of the state and the historically given facts in such a way that the general idea of freedom comes into its own in its concrete "institutions", as the

"realm of ethical life." Therefore, in his theory of the state, to which his philosophy of right referred, he sought the "architecture of its rationality," whereby he exposed himself to both liberal and conservative criticism. Hegel always reflected on this criticism.

Hegel's arguments of reason, related to experienced reality, were directed against a historical relativization that genetically fixed the state from its accidental conditions of origin, as well as against the wishful images that were oriented towards religious, moral, or aesthetic norms or maxims. In the end, he arrived at a concept of the state that paid homage neither to the empirical state of being nor to the optative of possible states. He sought to "comprehend his time" rationally, to bring it to its concept. Traditional and innovative elements were thereby balanced. Against the past, Hegel recognized, first, that the old household order of the *Oikos*, the basic unit of the estate-based society, has dissolved in favor of the intimate family; and that the liberated individual has become the "son of the entire civil society." For him, civil society was no longer a political order of rule, but, in line with British political economy and the then-Prussian legislation, had become an extra-political "system of needs." In it, with immense power, through the division of labor and competitive struggle, a class antagonism unfolds between the rich and the emerging proletariat, whose conflict—as in England—presses for relief, for expansion overseas, without being solvable from within itself. — At the same time, however, this modern civil society—secondly—contained the traditional concept of being an "external state," a "state of necessity and understanding," which regulates the unleashed satisfaction of needs through jurisdiction, corporative ties, and police orders. But precisely these traditional regulatory techniques were no longer sufficient to politically solve the economically and socially unsolvable conflicts in such a way that the freedom of individuals is preserved. Therefore, Hegel develops a superordinate concept of the state, whose "organism... is the political constitution." It encompassed family and society, individuals and estates equally, in order to institutionally secure the freedom once gained since the Reformation and through the Revolution. This constitution is bound by hereditary right as a "constitutional monarchy,"in order to escape the arbitrariness of subjective claims or the caprice of those electoral procedures which—as the German Empire or Poland have shown—prevent a state order. It knows (in this, anticipating the Prussian state) a bicameral representation of the estates, which, emerging from its social preconditions—land-bound or commercial—becomes politically active at the same time; it knows (in this, appropriate to the Prussian state) the official class as the general, as the third estate, which has to stand up for the whole, mediating between state and society in a supra-estate manner. Overall, it is a strong state, which can behave all the more liberally when it comes to resolving economic or social, inter-estate or church-political conflicts in a non-partisan way.

Hegel brought two fundamental experiences since the French Revolution to their common concept: the division of the labor-divided civil society on the one hand, and the unsurpassable consciousness of freedom of the citizens on the other. Both could only find an institutional place in a rational system of ethics, rights, and duties. As he once said in his Philosophy of History: "What constitutes the state is the matter of educated cognition." Notwithstanding the fact that Hegel had taken the individual steps of his argumentation from his logic, his concept formation was historically so saturated with reality that both critical and conformist consequences could be derived from it.

The extent to which Hegel founded his concept of the state in the self-legitimizing organizational achievement, which presupposes freedom as much as it secures it, is shown by the fact that he defined the state neither as an epiphenomenon of an extra-state society, nor as an emanation of a given people.

'People' and 'society' were for him only integral elements of a process that could only enter into reality legally and ethically in the state alone. With this, he had developed a concept of the state that was purely theoretically suited to remain equal to all the social and national challenges of the coming time, as long as it remained the organizational principle of coordination for both factors of movement.

Against this integral function of the Hegelian concept of the state, growing criticism was directed: from the conservatives in the name of the monarchy and a Christian state; from the liberals who, for example, in the name of natural law, demanded the fundamental rights not explicitly stated by Hegel; from the democrats who absorbed the state from the perspective of popular sovereignty; and finally from the socialists who split from their camp, who in the long run sought to completely replace the state with a self-administering humanity.

This left wing, which articulated itself from around 1840, remained most closely attached to the historico-philosophical drafts that had unfolded in response to the French Revolution. In this, the concept of the state was first consistently democratized, and second, it entered the horizon of a radically enlightened critique of religion. To the extent that the otherworldly realm was understood as a human projection and thus historicized, redemptive qualities accrued to the state, such as Hegel had still avoided.

d) The Historico-Philosophical Democratization of the Concept of the State. The Left no longer considered the state a *sui generis* entity. Empirically, they criticized it as a state of bureaucratic arbitrariness and feudal remnants, and theoretically, they designed it as the political expression of self-determining free men in a society constituting itself as sovereign. In RUGE's words: "Every society that rests completely on itself and moves according to its own will, every sovereign society is a state." Or as the young MARX said: "In democracy, the abstract state has ceased to be the dominant moment... In democracy, the constitution, the law, the state itself is only a self-determination of the people."

These is-statements are also concepts of the future. With growing temporal distance to the empirical givens of Hegel's philosophy of right, the Young Hegelians accused it of being merely "conceptual constructions of reason," "abstract, extravagant thinking of the modern state," without the actual state corresponding to reason. It was therefore a matter of proceeding to action and also realizing reason. The new turn to the future differed from the anticipations of the revolutionary era not in the expectation that right and reason would increasingly be realized in history, but in the certainty of being able to achieve this state immediately through radical criticism of the existing and through action. The democratic or socialist plans, already sketched out in the future by the early Romantics or by Fichte, thus gained an intensified content of hope, which has since been inherent in the democratic concept of the state and which pointed forward to the revolution of 1848. With this, any distinction between state and society, which the liberals, with Hegel, maintained, also vanished in left-wing theory. Thus, RUGE strove for "the elevation of the state and its opposite, civil society, into an all-encompassing and all-pervading commonwealth, which does not cease to be a *res publica*, but has every individual as its purpose, and is the organization of the entire society and its functions." Or in MARX's words: "Only political superstition still imagines today that civil life must be held together by the state, whereas conversely, in reality, the state is held together by civil life." In the tension between criticized present and expected future, the semantics of the state begins to shimmer again. Even the word becomes suspicious to RUGE: "State (is) a bad, dead word," as he argues with Adam Müller, "better is 'public life,' 'history,' 'realm of the spirit,' 'freedom.' These names indicate the self-determining movement, or the publicly and thoroughly realized reason of the people."

For the future "people's state," the "free state," he of course uses again, with Fichte, the concept of the "absolute state." It bears all the marks of Rousseau's democracy, right up to the *religion civile*; its "realization is religious practice or cult."

e) The Religious Content of the Left-Hegelian Concept of the State. In contrast to the Western Enlightenment, the Enlightenment in Germany always integrated the theological presuppositions and religious determinations it criticized, right up to Nietzsche's revaluations. That Ruge saw a de-theologized religion realizing itself in the future democracy indicates that secular process which, in a contrary movement, enriched the concept of the state with salvation-historical content. Already FEUERBACH, who believed Christianity had reached its end in order to incorporate its message into the anthropological self-foundation of man, drew the consequence that the democratic state, precisely without the church, had to take on a religious task. "For we must become religious again—politics must become our religion." The Western dualism of *sacerdotium* and *imperium* converges here in an all-encompassing concept of the state: salvation doctrine, too, is etaticized. The unreserved reduction of all dependencies of men to their mutual reliance on each other constitutes for Feuerbach the state as an "infinite being," which acquires all formerly divine epithets. "The state is the epitome of all realities, the state is the providence of man... The true state is the unlimited, infinite, true, perfect, divine man. The state is only then man—the state that determines itself, relates to itself, the absolute man." After the semantic pre-decisions to personify the state in general, it was now possible, through the anthropological reduction of religion, to vindicate its tasks of salvation as well.

With regard to the still existing churches and the ideology of the Christian state, Bruno Bauer, Moses Hess, and Karl Marx sharpened their criticism in order to abolish the dualism of state and church as a sign of alienation.

The church, wrote BRUNO BAUER, had hitherto "prevented the state from being truly being a state." But the state, conceived as a historical subject of action, is consequently responsible for this itself. "The church is nothing but the manifested imperfection of the not-yet-finished state, the self-posited appearance of its weakness, the necessary expression of the fact that it is not yet truly a state, has not yet made man into man." MOSES HESS goes a step further in his historico-philosophical draft. "The bodiless idealism of the Christian heaven has come down from heaven to earth, has become the state. But alongside it, the spiritless materialism of the Christian world also still exists; it exists in civil society. The modern state", which has only been realized in the Western constitutional states but not yet in Germany, "has only sharpened the opposition between the individual and the species again; indeed, it has brought it to its completion... This contradiction is only solved by socialism, which gets serious about the realization and negation of philosophy, which leaves philosophy as well as the state aside."

What Ruge, Feuerbach, and Bruno Bauer had still intended for the free and absolute, the democratic state—to liberate man to himself—is already assigned by Hess to socialism, which "leaves the state aside". Here now lies the starting point of the young MARX. He too criticizes the liberal state because it still presupposes religion, which it protects as a private matter by virtue of its fundamental rights. "The democratic, the real state" is already a step further; "it does not need religion for its political completion." But only when religion, as an expression of the self-alienation of man from man, becomes completely superfluous, can men realize themselves as free and rational beings. From this followed a historical scale of state semantics, which ultimately makes the state itself superfluous. "The so-called Christian state is

simply conceived as a non-state, as the Christian negation of the state." And even the "perfected democracy," which still tolerates religion as a "private matter of civil society" within it, prevents the self-realization of men.

"The emancipation of the state from religion is not the emancipation of the real man from religion." Marx's vision of the future already leads beyond the critique of religion, in order to eliminate all class rule and thus all rule whatsoever through the abolition of private property relations and a class-based labor constitution. Once the proletariat, which as the only class embodies the general interest, has seized power, "rule itself will disappear with the abolition of the entire old form of society." "There will be no more political power proper." With this thesis, which points forward to the later doctrine of the 'withering away of the state', Marx stands, notwithstanding his new, namely economically founded, philosophy of history, still in the tradition of the German late Enlightenment and Idealism. A specifically German strand of state semantics has aimed for half a century at a future in which, with the elimination of the existing princely state, rule in general and thus the state itself could be eliminated.

f) The Abolition of the State. The future ideal state contained, by virtue of the then self-governing citizens, expectant signs that announced its self-abolition. Without this interpretation pattern having become generally accepted, it appeared again and again, whereby an ethically understood Christianity provided those certainties of salvation that were now historico-philosophically fused. Thus the Illuminati believed in a self-acting history that would make all states superfluous as soon as their secret work of virtue had created the preconditions for it. Morality, as whose executor they understood themselves, was "the art which teaches men to make princes and states dispensable." KANT, on the other hand, strictly adhered to the separation of state legality and inner morality. But in a historico-philosophical perspective, he saw in his own, the present... time all the chances that humanity was moving in "continuous approximation towards the invisible kingdom of God on earth." With the transition from church faith to a religion of reason, humanity approaches a (divine) "ethical state," in which virtue could also rule publicly—however dangerous this may be in politics today.

It characterizes the awakening of the subsequent generation of Romantics and Idealists that they perceived this dualistic opposition between a legal and an ethical state as unbearable, as a challenge, in order to abolish it. In the first system-program of 1796/7, the future convergence is anticipated, whereby first the existing state, which as a machine-state allows no freedom, must be overcome. "We must therefore go beyond the state! ... every state must treat free men as mechanical clockwork; and it should not do that; therefore it should cease to exist". And the program ends, after a passage through rational history, through aesthetics, poetry, and mythology, with the expectation of a new foundation of religion that necessarily melts the state into itself. FICHTE has most consistently drawn out this strand diachronically. "The state, just like all human institutions that are mere means, aims at its own destruction: it is the purpose of all government to make government superfluous". And even before his death, he maintained that by virtue of "universal education... in the realm of Christianity, the traditional coercive government would gradually fall asleep." Judges, police, and authorities would find no business year in and year out, because morality and legality would coincide. Thus, "the present coercive state will quietly die of its own nullity brought about by time, without any show of force against it".

With this, the theme was struck that the Young Hegelians took up again with Fichtean willpower, and which was only to become widely effective in the socialist movement (see below, Section IV. 8.).

The less effective Catholic counter-position was developed by the convert FRIEDRICH SCHLEGEL, when he saw the state in the future being absorbed into the comprehensive church. "The state must finally disappear completely and be fully absorbed into the church; only the family remains, until finally the entire human race... becomes one great family." Under this perspective, the modern state, which increases "material power" and its "absolute authority", becomes a sinful "anti-state." Thus, the left-wing historico-philosophical and the conservative historico-theological views converge in their distant goals. The actual state will disappear in favor of higher goals for humanity.

2. 'State' in Class-Specific Conflicting Usage

a) The Emphatic Use of the Word. The utopian surplus, which derived the self-abolition of the state from the concept of the state (however this finding looks under the pressure of the 20th century's world powers), comes from the Protestant educated middle class. The assenting and emphatic use of the concept also originates from the same strata that were preparing to claim the state as the domain of their active work. These were the jurists and the officials, who had to devote themselves to state service daily and who naturally developed their own technical terminology; they were the exempt academics, theologians, and idealist philosophers, and especially historians, who increasingly oriented themselves on the primary subject of action, the 'state', and thus gained a growing influence on public opinion and, in some areas, on politics as well. Measured against the total population and its new estate-based political party formation, it was a narrow, albeit very influential group, whose enduring use of the word could occasionally escalate to the 'divinity' or 'holiness' of the state. Only politically, not historico-theoretically, did this conceptual formation stand in opposition to the thesis of the self-abolition of the state. For in both cases, it was about the self-realization of the autonomous citizens, whether in the state itself, conceived as 'holy', or through its abolition as an instrument of rule of men over men, in order to let only the laws rule. SCHELLING had found a phrase that mediates between both poles. The task was "to make the state, if not dispensable and to abolish it, at least to bring it about that it gradually frees itself from the blind force by which it is also governed and transfigures itself into intelligence". Intelligence, however, was an idealist category of the spirit and at the same time related to the educated elite who recognize the laws of reason. Either way, 'state' remained the temporalized guiding concept for personal engagement. "As once the Holy Sepulchre and later the New World victoriously attracted every striving spirit, so it is now with the state. Only that which leans on it, only that which is recognized by it, has faith in itself; the time of private servitude is completely over". Transfiguration into intelligence; the state that recognizes; faith in oneself: the semantics of the state remain theologically intoned.

The new, elevated use of the word was not shared by KANT, but it was induced by him. His phrase of a "divine state to be imagined here on earth" still stands in the Augustinian tradition of the two-kingdoms doctrine and refers to the visible church. But when Kant calls the "idea of a state constitution holy and irresistible," this consequential conceptual formation has no religious meaning for him anymore. Behind it, rather, stands the Germanized sense of the Roman-Ciceronian *salus rei publicae* and above all its genuinely moral-philosophical justification: that virtue is and remains its own end and therefore possesses an inner-worldly holiness itself, which contains its own "reward" within it. From this premise, which relates to humanity in everyone, the holiness of the external state constitution is also derived, in order to prevent revolutions but to generate reforms of the state.

Already directly related to the concrete state, HEYDENREICH said: "Moral education, development of all higher faculties of humanity is the purpose for which the state must be holy to everyone," in order to conclude from this that moral progress reaches a goal "where no bonds of the state are any longer necessary to hold men within the limits of justice... where freedom and virtue rule by themselves". The more moral, the more whole or the holier the state becomes, the sooner it makes itself superfluous—something Kant had shied away from saying in this way.

In the following period, the holiness of the state is taken increasingly empirically at its word, psychologically reduced, until it becomes an ideologeme. BURKE spoke pragmatically: "we have consecrated the state, that no man should approach to look into its defects or corruptions but with due caution; that he should never dream of beginning its reformation by its subversion", and GENTZ translated just as pragmatically, that "we have sanctified the state, so that no one should unveil its flaws otherwise than with timid reverence, so that it may not occur to anyone to dream of beginning its improvement with its destruction". Or FRIEDRICH SCHLEGEL demanded even more consequently the quasi-sacred submission: "the citizens must, of course, be completely convinced of the holiness of the state power (*sic*!), while the state itself must have all means to assert its power and to vigorously realize its final purpose". FICHTE was more cautious here when he vindicated the educational mission for the state, "to compel men to their salvation". The state acted only as the "highest administrator of human affairs" and was therefore "the guardian of the immature, responsible to God and his conscience alone". The state itself is not holy, but only the goal towards which it has to work as an absolute subject of action.

HEGEL, too, who interpreted the decay of the churches as a prerequisite for the rationally trans-confessional state in a progressive manner, and who no longer extended the course of God through the concrete states into a religious future, did not apostrophize the existing state as divine in the theological sense, referring to transcendence: "The state is divine will as present spirit, unfolding itself into the real form and organization of a world". The state as a subject of action remains the ultimate political instance, but as such it is only the respectively realized possibility of reason. "It is the march of God in the world, that the state exists: its ground is the power of reason realizing itself as will. But: In the idea of the state, one must not have particular states in view, not particular institutions, one must rather consider the idea, this real God, for itself". For Hegel, who had summarized the Kantian dualism of the legal and the moral state in the ethical state, and who had consequently rejected using religion as legitimation for the state, the state remained a waystation of the world spirit, but only as an unsurpassable final instance of human self-organization to the extent that it must become certain of its reason.

Hegel stood before the unsolvable problem, after his consistent destruction of a two-worlds doctrine, of saving the only, as it were, divine function of the state, namely to realize reason, without providing the empirical state itself with the attributes of the God transposed into the world spirit. This sublime tightrope walk could not be maintained in everyday language.

For RANKE, the states were independent "individualities... spiritual entities, original creations of the human spirit—one might say, thoughts of God," whereby he took Hegel empirically and then dualistically unfolded him again. DROYSEN saw, in a good Lutheran and Hegelian manner at once, in the state "the right order of God, a charisma". It remained for Protestant orthodoxy to take up the challenge of Hegel and turn it against him. STAHL legitimized the state in a strictly Lutheran way and with reference to Romans 13:1 as an authority instituted by God. "Thus the state is the conductor of the divine influences

on the external condition of men. It shall order and promote it in God's stead...". "This state is instituted so that a rule over man may exist, and it is holy, to fulfill it with reverence". This kind of holiness or God's-deputyship is no longer understood inner-worldly as a rational self-organization, but is used functionally to justify monarchical rule, to demand obedience.

ERNST LUDWIG VON GERLACH went even further and sought, analogous to the Catholic Schlegel, to trace the existence of the Prussian state and thus of all Christian states back to the Christian church. The state becomes entirely an epiphenomenon of the divine laws and the divine message, which the church administers. "The Christian state is empire and state from God's creation and commandments". Such a re-linking of the modern state to biblical revelation as the legal source of its existence may rightly be termed an ideological conceptual formation, because it was able to reinterpret reality but no longer to catch up with it. More widely effective, but in reverse equally ideological, was the position of TREITSCHKE when he invoked Kant and Fichte as he conjured up reverence for the "outwardly directed will of God, which reveals itself in the life of the state". For here, for Treitschke, "the high moral good of national honor" comes into play, "which is passed down from generation to generation, which has something absolutely holy and compels the individual to sacrifice himself to it".

Measured against the moral starting position of Kant and the ethical-rational positions of Fichte or Hegel, the divine or holy conceptual determination of the state has been increasingly vulgarized, reified onto the concrete state. The idea of the holy state, formerly a moral-ethical postulate, had degenerated into ideology as soon as the control instance of the always co-posited reason of idealism had disappeared in favor of a fervent acceptance of the state as God's revelation.

Much more saturated with reality was HEGEL's usual determination that "the state... is living spirit as such." For in relation to Prussia, which lacked national, religious, economic, linguistic, and even geographical unity, its spiritual self-determination gained all the more evidence as the educated elite, as bearers of intelligence, could identify with it. Hegel's phrase, "it is the Prussian state... that is built on intelligence," is documented in numerous variants and captures the self-interpretation of the official class, in which state and society still completely converge: "The third—the thinking—estate has the general interests as its business." What for Marx the proletariat and for Sieyès the Third Estate of the citizens stood for, namely to embody the entirety of society, was for Hegel the responsibility of the actual state estate: the official class as the Third Estate, which had to mediate generally between the land-bound interests of the first and the bourgeois, commercial interests of the second estate. Against this bureaucratic state, rising criticism has since been directed from almost all non-officially privileged strata, but also from circles of the bureaucracy itself.

b) Critical Uses of the Word. It characterizes the significance of 'state' in the entire political linguistic household of all strata and groups that its emphatic use by no means dominates—apart from the linguistic usage of the educated middle class; indeed, that it did not even remain central—notwithstanding its inescapably central use in legal terminology as the guiding concept of state law. This finding had its reason, which is understandable in the German situation. Neither the respective constitutions of the individual states were consensual for all, nor was the sum of all states in the German Confederation generally acceptable. 'States' in the plural offered no emotional identification. The republican, the liberal, and the gradually increasing democratic bourgeoisie, insofar as it expressed itself in the press, brochures, books, parliamentary debates, addresses, or in the political poetry of 1813ff., 1830ff., and since 1840

against all censorship, preferred other concepts in an emphatic sense: 'people', 'nation', 'unity', 'freedom', 'fatherland', the 'Reich' or concretely 'Germany', and especially 'constitution', to give emphasis to its demands. In a representative phrase by FICHTE: "People and fatherland in this sense, as bearer and pledge of earthly eternity, and as that which can be eternal here below, lies far beyond the state, in the ordinary sense of the word, beyond the social order, as it is grasped in the merely clear concept, and established and maintained according to this concept." The love of the fatherland seeks more, the divine in this world. "For this very reason, this love of the fatherland must itself govern the state, as the absolutely supreme, final, and independent authority". From this position, the increasingly state-critical use of the word effortlessly arose, which was also directed by the conservative side in the name of king and country against the bureaucratic state.

The rejection grew, the more conservative and the more radical the political spectrum fanned out between 1815 and 1848. The traditional criticism was easy to take up. When LESSING already said: "A state is far too abstract a concept for our feelings", he was referring to the technical-functional meaning that was necessarily inherent in the modern concept of the state and has remained so.

In the sober perspective of a state theorist like SCHLÖZER, the same fact is named, because the state is inevitably responsible for everything for which it sovereignly declares itself competent: "Oh! the poor state must nowadays, as the church in the hierarchy, lend its name to all good and bad things". And STOLBERG, in the Göttingen Poets' Circle, confirms this from the opposing camp: "The fatherland sinks down to the state, a merry (airy?) word that consecrates every nonsense".

The old-estate, the conservative camp, which felt obliged only to the monarch personally, used the concept of the state only with reservation or explicitly dismissively. Thus HALLER scourged the "general confusion of concepts" that philosophical state law had brought about since the end of the 18th century. Instead of the "old, powerful and heartfelt, house-fatherly or manorial linguistic usage animated by the feeling of one's own and others' rights," there was now talk of "state-servants,... state-finances, state-properties, state- or even humanity's-purposes, state-organizations and the like". Even to call the prince the 'head of state' or 'regent', as had become customary, was a "semi-revolutionary expression". For Haller, a state was given only when the prince exercised supreme power by his own commission from nature. Any determination of purpose or social doctrine derived from a contract theory misses the essence of a state, which Haller sees fulfilled in a graded, purely personal exercise of power and its corresponding services. "States are only the highest gradation of natural service and societal or so-called private relationships", which do not allow for a public law at all. This reduction of the state to the "original patrimonial association" robbed the state of any legal and institutional guarantee. Its concept is ultimately reduced to the higher power of the ruler, predetermined by God and nature , a view that found resonance in the camarilla around Frederick William IV.

It characterizes conservative usage that the 'state' is stripped of its historico-philosophical, its teleological future dimension. 'State' is now historically relativized and typologized; so by HEINRICH LEO, who designed a "Natural Doctrine of the State," whose formal and content-related criteria were suitable to categorize all states of history under recurring types. Fundamentally, the state was "earlier than its members," "not an invention of men, but a manifestation of God," the more "naturally grown... the purer... a work of art of divine origin". The socio-historically saturated study thus also has a political point, namely to turn against the "fanatical ideocracy" that derives the state from a principle, considers it

feasible, and whose "last manifestation was Robespierre's state," which sought to implement a supposedly "rational" state. So it is not surprising that Leo, despite and because of his historical-typologizing use, classified 'state' as "a word from the mouths of professors". The semantic reservation is still evident with CONSTANTIN FRANTZ when he published "The Natural Doctrine of the State as the Foundation of all Political Science" in 1870. Unjustly, according to the "constitutional theory... the country... is treated as an object subject to state power"; semantically, 'country' even deserves precedence over 'state'; "one speaks of the Landtag (state diet), not the Staatstag (state diet), better of Landrecht (state law) than of a Staatsverfassung (state constitution)... Although in recent times many designations have been formed by compositions with 'state', they mostly betray their artificial origin very clearly... The state is a colorless being".

But precisely in this, the conservatives also saw a threat. LANCIZOLLE criticized the concept of the state as "an abstraction... borrowed from a republic... and also placed into the monarchy". Concrete expressions like 'sovereign', 'king', 'authority', 'commonwealth' had now been replaced "by one and the same expression," which had also been put into circulation for business language. The different values were thus identified "into an all-encompassing, but feigned unity".

As indispensable as the concept of the state had long since become, it fell into partisan perspectives, seemed to be the monopoly of the rule of officials and their administrative machine, from which RADOWITZ urged his king to free himself in 1846. The task was to "eliminate state absolutism".

In a reverse manner, it sounded from the bourgeois camp, from the liberals to the socialists. Full of pathos, BAMBERGER spoke in 1848 of the time "when the entire content of our concept of the state consisted merely in authority or in brutality, in spiritual or physical tyranny, when right and politics were to be founded on commandments whose source one was not allowed to seek in human nature, not in the human breast". For BÖRNE, the existing aristocratic princely state was a "coffin", for MOSES HESS a "people-flogging institution," to which he, however, turning the semantics of the state positively, contrasted the "people's state," the "founding of the people's republic". A complete, ironic inversion is finally accomplished by an agitational battle song from the time of the Anti-Socialist Laws against the "state criminal State," whereby the originator of the exceptional laws is accused of what he imputed to his "enemies of the state" to be, namely "state criminals". It is one of the very rare cases where 'state' is mentioned at all in political poetry.

In his anarchist consequence, MAX STIRNER, insisting on the uniqueness and autonomy of his self, went furthest to unhinge the state. "Every state is a despotism," because it is always connected with rule. And its sacralization only serves the degradation of the autonomous man. "Compared to the holiness of the state, the individual is only a vessel of dishonor". States would therefore only last as long as "one's own will knows itself to be in agreement with the ruling will". If all stood by their own will, they would "abolish the state".

While the critical use of the word described so far was cultivated by the educated speakers of the emerging parties, it may be said of the broad mass of the population, especially in the countryside, that the concept of the state was least in circulation, and if so, then also pejoratively. "The common man," it is said in 1802, "who cannot grasp the moral being that the scholar calls the state, therefore still calls the state of which he is a member his country, its regent his sovereign, his father of the country, not the head

of state". That is why a petitioning peasant could answer his king, who invoked the state and his order to refuse the request: "Oh! I knew well that it is not my beloved king who opposes me, but the scoundrel of a state," a phrase that, then mockingly taken up by Frederick William IV, became proverbial. Here lies the traditional figure of thought that the distant king is still wiser and more helpful than the concrete grievances against which one rebels would suggest. It was, of course, the same topology that the demanding citizens also used to personally commit the monarch to their own ideals: precisely the loyalty to the sovereign was used rhetorically to urge him to change the state constitution.

Certainly, over the course of the century, the personal bonds of loyalty have diminished in a class-specific manner, least of all in the countryside and in the noble officer corps. And if they were further cultivated in the bourgeoisie, especially in the Second German Empire, it is difficult to decide whether this is already a secondary ideological formation of Wilhelminism. In any case, CONSTANTIN FRANTZ already used the argument defensively for publicistic purposes when he said: "The people speak of the country's welfare and also of the country's damages, hardly ever of the state's welfare or of state damages. They are still (sic!) more attached to the country than to the state, which seems too abstract to them". The old negative, apparently declining usage became a conservative protective argument.

In political linguistic pragmatics, therefore, the concept of 'state', which had become indispensable in theory and in state law and in practice as a fundamental concept, had a fluctuating status, and that beyond the revolution of 1848. From a conservative as well as a socialist and also a democratic side, the empirical state and its constitutional forms are rejected as insufficient. And where the partly conservative, partly liberal center of the bourgeois educated classes used 'state' affirmatively, two main points can be shown: Either the state is programmatically projected into the future as an ideal and thus also gains a critical potential against the existing state. Or the state is accepted as existing: but then it quickly enters that formal-legal field of meaning to which hardly any emotions could be attached. And in the bureaucracy itself, the state remained so much and certainly increasingly bound to the monarchy that loyalty to the ruler was implicitly part of the state ethos that was cultivated within the civil service. Here alone is found that emphatic use of the word that repeatedly provoked its ideological criticism.

Therefore, it can be concluded that 'state', between enthusiastic approval and malicious rejection, had indeed become a fundamental concept, without which the specifically German-articulated experiences and expectations of all social strata could not be had.

3. Lexicon Level*

Only in rare cases can lexicography be described as semantically innovative. Mostly, lexicons and dictionaries register innovations that have already taken place, which they seek to introduce normatively into everyday language. Therefore, they have a high social-historical effectiveness. They carry out linguistic regulations that are registered, and often adopted, by the affluent and literate strata. In this respect, some semantic innovations are compiled here, which, of course, cannot take into account the broad range of all definitions.

First, a finding must be pointed out that indicates a growing distance of German conceptual formation from Western word usage. The general meaning of '*status*' as "position," "estate," and "condition of a thing" or "of a person," also of a group of people, is maintained throughout the Latin-oriented languages.

When NICOT (1621) registers '*Estat*' with numerous meaning variants from *status regni* to *conditio humana*, the list points to various non-political semantic contents that are never abandoned by later lexicons. The French Academy dictionary defines '*Estat*' (since 1786 '*État*') in 1695 primarily as "*disposition dans laquelle se trouve une personne, une chose, une affaire*" (the disposition in which a person, a thing, an affair finds itself), only to offer a political constitutional definition later on. The comprehensive basic meaning and the sequence have remained unchanged to this day. Similarly, English word usage is lexicalized. COTGRAVE (1611) follows the French order in his bilingual dictionary, but can rarely provide the English equivalent 'estate' or 'state' for the French '*estat*'. DYCHE (1740) and JOHNSON (1755: "state, 1. condition; circumstances of nature or fortune"), for whom 'state' has already become quite common, also adhere to the broad spectrum, only to bring estate-based, social, or political definitions later; a practice that likewise dominates to this day.

(**This section could not have been written without the great help of Iris Born and Beatrix Häusler.*)

In the course of the Germanization of '*status*' and '*estat*', the German use of the word 'Staat' slowly departs from this common European tradition. MAALER (1561) does not yet know 'Stat', only "*Ein Statt... urbs*" (A city... urbs); SCHOTTEL (1663) registers only the adjective "*statlich... civicus*", referring to urban and estate-based functions; STIELER (1691) first mentions "*der Stat = status, respublica*", with reference to the non-political meanings in Italian and with special reference to "*Fürstenstat*" (princely state); but in 1695 he registers in the first place for 'Stat' a traditionally general meaning: "the posture and condition of a person," followed by the political-estate specification: "is otherwise the common being and appearance". FRISCH, who in 1741 first records the new spelling 'Staat' and traces it back to Latin and French influence (against the German 'Statt', 'Stätte'), already notes the divergence of German word usage from the overarching semantic horizon: "Staat formerly meant the condition of every profession, *status conditio*". ZEDLER (1744) defines numerous meanings and word compositions over 71 pages, but all are already concentrated on the state-estate sphere, on government and constitution. ADELUNG already looks back: "Der Staat... the condition, the nature of a person or thing; a meaning completely unknown in High German, and only still current in some Upper German regions".

Purely in terms of word history, the political attributions since the middle of the 18th century have gained an exclusive character for the Germanized word 'Staat', at the expense of the broader and alternative meaning zones of 'condition' of any kind, which continue to live on in the West. Without overestimating this process, it can be said that the narrowing of the word's meaning to the political linguistic sphere has already prepared the way for the future monopoly position of the guiding concept 'Staat'. The political concept 'état' has played a far lesser role in French after the Revolution, both lexically and in constitutional texts, than 'république', 'constitution', 'empire'.

The formation of a genuine concept of the state from the estate-state double meanings of 'état' or 'Stat' takes place in Germany and in France in different ways. For in France, 'état' as 'state' remains alongside 'état' as 'estate' until the French Revolution, with the meanings increasingly separating. In Germany, 'Staat' and 'Stand' separate completely as words, but the concept 'Staat' retains estate-based connotations longer than in France. In the 17th century, the commonality is still striking. Thus, for NICOT, *Estat* is both "*Estat du Royaume, status regni*", as well as "*le rang, ordre politique entre les hommes d'un Royaume, eines Landes, einer Herrschaft*" (the rank, political order among the men of a kingdom, a country, a dominion), as the three French estates are also called (*trois estats*). Similar phrases are also registered by

RICHELET in 1680. Even more strongly, FURETIÈRE in 1690 emphasizes the aspect of rule over a country: "*Estat, Royaume, Provinces ou estendue de pays qui sont sous une même domination*" (State, kingdom, provinces or extent of country that are under the same dominion); to which is added the form of rule: "*la domination ou... la manière dont on se gouverne dans une nation*" (the dominion or... the manner in which one governs oneself in a nation), be it monarchical, democratic, etc., and the usual series of the three estates. Land and people—the later dogmatized elements of definition—are thus already mentioned, but entirely related to 'rule'. Similarly, the French Academy dictionary defines 'state' as "*Gouvernement d'un peuple vivant sous la domination d'un Prince, ou en Republique*" (Government of a people living under the dominion of a Prince, or in a Republic), a definition that persists from 1695 to 1786.

In terms of constitutional structure, German usage remains very close to this French usage. MAALER registers only the German "Ein Statt urbs, polis, oppidum, civitas oder Bürgerschafft" (A City... or Citizenry). A century later, SCHOTTEL, without naming the noun, clearly relates "statlich" (stately) to the estate-based order of rule: as one says "Princely high authority | Comital | Baronial | Noble authority / thus also stately jurisdiction... *Aliud est statlich quod statum aut ordinem decorat*" (It is another thing for 'stately' to adorn the state or order). With STIELER, the 'condition' of the commonwealth still resonates when he translates 'Stat' as *status, respublica*; 'Fürstenstat' (princely state) is clearly associated with political rule: *gubernatio, regimen, ductus et ratio principis*. But the estate-based connotations are retained in the 18th century. FRISCH describes 'Staat' as "an office, profession, function in the commonwealth," and he names the three criteria of the coming concept of the state in a very traditional way: "to bring state, land, and people under one government," or more narrowly: "State, the government of a great lord, king, or prince."

ZEDLER (cf. II. 6, note 61) moves within this framework, despite numerous differentiations and word combinations, when he summarizes 'Staat' and 'Stand' (state and estate) in one category as "the government, or the form of government and constitution between authority and subjects of a country." Specifically, he calls the constitution of certain realms 'Staat' or 'Etat', in the sense of "condition in general,... scope and form of government." To this extent, German usage still moves in analogous paths to that in the neighboring Western state. The body metaphor appears for the first time lexically in Zedler: "Staats-Cörper, oder Staats-Systema" (State-Body, or State-System) "and means nothing other than the state or the constitution of a country, or of a republic, only that authorities and subjects are described pluralistically as heads and members, corresponding to the German constitution."

While hitherto the more (in Germany) or less (in France) hierarchically structured estate-based order of rule and its lavish representation stabilized the experience that the state acts from top to bottom, the perspective changes fundamentally with the *Encyclopédie*: "*Etat, (droit polit.) terme générique qui désigne une société d'hommes, vivants ensemble sous un gouvernement quelconque, heureux ou malheureux*" (State, (political law) a generic term that designates a society of men, living together under some government, happy or unhappy). Therefore, one could also define *l'état* as "civil society" (*société civile*), which finds security and happiness under the protection of the Sovereign, in contrast to the *état de nature* (state of nature). With explicit reference to Cicero, the state thus also enters lexically into the theoretical history of civil society and, led out of a pragmatic description, becomes capable of theoretical treatment. One could also consider the state a moral person, as a "*union de plusieurs personnes en un seul corps*" (union of several persons into a single body), whose head is the sovereign. This society, permeated by a "soul" (*âme*), differs from the "multitude" and lives under a *pouvoir supérieur* (superior power) from

the commitment of all individuals. "*Sans cela (sc. l'état) on ne sauroit concevoir de société civile*" (Without this (i.e., the state), one could not conceive of a civil society).

Under the pen of JAUCOURT, an estate-based concept of rule has become a social concept of action and constitution. The state, as a subject of action, has its own will and, like a body as in Zedler, can also succumb to illnesses that must be fought: The causes of state ailments lie, of course, "in the vices of the government" (*dans les vices du gouvernement*), which is polemically halfway defined out of the picture. With long digressions on the history of the third estate, which as a free people strives for participation in government, and on the composite states of the neighboring European countries, a picture of the *état simple* (simple state) is designed, which by definition differs from the composite German Empire.

The socio-theoretical derivation of the state by the great *Encyclopédie* acted as a lexical model. Thus, in 1786, on the eve of the revolution, the *Encyclopédie méthodique* defined the *État politique* as "*l'étendue de pays qu'une société civile occupe, et le nombre des membres de ce même corps soumis au même chef*" (the extent of country that a civil society occupies, and the number of members of this same body subject to the same chief). The triad of state territory, state populace, and state power is emerging. But the formation of society becomes primary, the form of rule disposable. "*Toute société qui se gouverne elle-même, sous quelque forme que ce soit, est un état souverain*" (Every society that governs itself, in whatever form, is a sovereign state). Sovereignty has definitively passed from the king to the state. From this *État politique*, the *État civil* is at the same time distinguished, which, temporalized, is equivalent to the *état de civilisation*. It is founded in the *contrat social*, leaves the state of nature, in that justice, morality, reason, "civil liberty" (*liberté civile*) and "property" (*propriété*) are gained and secured. With this, the separation of state and society in German terminology has been accomplished. Legitimacy rests in the civilizing society, which disposes over the mode of rule of the *état politique*. "*Dans l'état civil, la liberté naturelle est limitée par la volonté générale ou par la loi*" (In the civil state, natural liberty is limited by the general will or by the law), whereby, following Rousseau, any personal rule of the absolutist system becomes superfluous. How great the distance has become is shown by a look at ZEDLER, who still traditionally identified the political and the civil sphere: "State, (Civil-) Civil State, Lat. *Status civilis*, or *Status politicus*, Fr. *Etat civil*, and *Etat politique* or *Etat de Police*, is properly the constitution of a State or Republic, in contrast to the War- or Military-State".

And how hesitantly the concept of the state in German moved away from its primarily estate-ruling meaning, and how little the new, comprehensive concept of the state could be derived from a theory of civil society, is testified by the lexicons around the turn of the century. For WALCH (1775), 'state' is only "sometimes... as much as a republic, or civil society"; MORITZ defines it in 1800 vaguely as "rule, state constitution, empire, country, special conditional society". ADELUNG conceives of the state, alongside the continuing estate-based meanings, also as "a multitude of people," but only in the narrower sense of "a numerous society of men, who stand under the common bond of a form of government;" whereby it is distinguished from "people" and "nation," with the latter concepts being deliberately posited as non-political. New and pathbreaking in Adelung is that he distinguishes an abstract, non-plural use of 'state' from the concrete multitude of existing states in Europe, among which "both a Free State, a free Republic, as well as the Prussian States" can be found.

CAMPE, as always, goes beyond Adelung by designating the "union of a coherent, self-existing society of men with the same constitution as a whole." Only now does 'state' lexically become the sole

superordinate concept, where then "the rulers as well as the ruled belong to the state, but the supreme ruler is not a being different from the state, or at least should not be." The socio-theoretical justification shifts, more than in France, to the overarching concept of the state, into which the regent is integrated. The state clearly becomes a subject of action. "If one speaks of such a civil society, which is called a state, in general, or of a specific state, it is always in the singular." "The state may demand this of its members. Without such an agreement, no state can exist."

Campe also registers for the first time 'Staatsbürger' (citizen of the state), a specifically German innovation, in great contrast to the equivalent '*citoyen*', which could seamlessly transition from its urban-citizen meaning to membership in the *société civile* (*état civil*).

Looking at German lexicography of the 19th century, three general trends can be identified.

1. In view of the pluralism of states within the German Confederation, the concept of the 'ideal state', the 'idea of the state', the 'state as such', or the 'state in and of itself' plays a partly compensatory, partly future-opening, in any case a leading role. The more empirical triad of state power, state territory, and state populace becomes uncertain at the latest with the concept of 'people' (more rarely 'nation'), because the (linguistic) people extended beyond the individual states and provoked the ideal state.
2. The systematic justifications of the state, partly implicitly, partly explicitly demanding reforms, with constant recourse to the Enlightenment, the Revolution, and Idealism, dominate until the middle of the century. The historicization of the conceptuality of the state begins already in the *Vormärz* and thereafter increasingly gains evidentiary power for the existing states. This applies tendentially even to the sequence of the three great state lexicons (*Rotteck/Welcker* in its three editions, *Bluntschli/Brater*, *Wagener*).
3. The articles become shorter after the middle of the century, finally to favor concise, positivistic definitions of the ruling doctrine after the founding of the Reich—a process to which the purely historical retrospectives correspond.

When the lexicons are consulted regarding democratic, liberal, or conservative conceptual contents, a clear liberal basic consensus emerges, even if it is articulated in a very fluctuating manner.

a) Volkssouveränität (Popular Sovereignty). Consistent doctrines of democratic popular sovereignty appear in the articles only with reservations. The shift from the power of personal rule to abstract state power is generally brought to a concept, but it by no means follows from this that the people—still an object and addressee of rule at the end of the 18th century—now rose to become the subject of the state itself. The BROCKHAUS of 1820, which refers to the democratic-republican state constitution not without sympathy, nevertheless assures in the tradition of the estates, on the threshold of possessive individualism: "*Volksregierung* (A popular government) is never one of the rabble... but one of house- and family-fathers, who *are* something and *have* something." Men as mere men, i.e., without property, could not enter into a state union. The 1836 edition refers to the "consequential exaggerations of *Volkssouveränität*"; but on the eve of the revolution, in 1847, the state is newly defined as "the epitome of the public institutions of a *Volk*," an emphatic formula that the democrat BLUM could also adopt in 1851.

But the BROCKHAUS immediately insisted on the historical *a priori* of the state. "Even if it can always only receive its life from the people," it nevertheless assumes "the character of a self-acting organism." Even if the state serves all purposes of the people in its own way: "The individual, concrete state... everywhere emerged from the state in itself and brought its foundation with it from it." And in the 10th edition of 1854, it says laconically: "In land and *Volk* is thus given the body of the state, the realization of the concept of the state." This subordination of the concept of the people, still derived from the ideal state, also stands behind the seemingly radical formula in BLUNTSCHLI/BRATER: "The true state is a *Volksstaat*,... the head of state is only its member." For "all public law is indeed conditioned by the existence of the *Volksgemeinschaft* (people's community)" in the empirical sense, "but it has its content from the state,... is constitutional law." The state (*res publica*) corresponds to the people in the higher sense (*res populi*), whereby, despite verbal proximity, any basis for a directly democratic interpretation was removed.

An exception, presented with rapid pace on the lexicon level, is offered solely by MEYER (1852). Although he adheres to the fundamental liberal principle that the "development of individual freedom... according to the modern view is always the core of state life," that the state should "refrain as much as possible from all interventions," he takes the new socialist challenge seriously. With it, the state "itself is called into question." But the history of the most recent struggles for freedom and revolutions proves that "*Volk* and state are essentially one and the same... i.e., that the people are sovereign in determining their organization into a state." The historical typology of constitutions, once temporalized, points in a clear direction: "In the idea, the absolute monarchy is the state of the past, the social-democratic republic the state of the future." And Meyer leaves no doubt that this "solely decisive alternative is a pure question of power." "What decides the form of the state is who holds full power in the state," a formulation that is otherwise avoided—the Meyer appeared, far from censorship, in Hildburghausen and Amsterdam.

b) The Rechtsstaat (Rule-of-Law State) and its Opponents. Even if censorship is taken into account, it characterizes the basic consensus of the lexicographers that there is no talk of a 'power state' (*Machtstaat*), but consistently of a 'rule-of-law state' (*Rechtsstaat*). Only the *Rotteck/Welcker*, politically the most influential lexicon before 1848, and occasionally the *Brockhaus*, for example *Brockhaus' "Conservations-Lexikon der Gegenwart"* around 1840, escalate to the threat that a legally impermissible revolution would become inevitable if no liberal reforms were to take place.

MELLIN, with his Kantian encyclopedia in 1802, lexically prepared the concept of the *Rechtsstaat*. If a human union were to be thought of as living according to *a priori* laws of right, it would have to strive to realize "the form of a state in general, i.e., the state in the idea." KRUG follows him most decisively. At first, he takes up, seemingly unbroken, the Aristotelian-Ciceronian tradition: "State (from *status scil. civilis*, the civil condition) actually means the citizenry or the burghership itself," with which he politically challenged the classically educated bourgeoisie of his time. The state was "actually a civil society (*civitas*)." But to the question of what distinguishes it, he answers curtly that "the state is a society of right." And he concludes in a Kantian manner that "to realize the idea of right" is the "next or immediate... purpose of the state," "to promote the common good or public welfare" only its "mediate purpose."

From this starting position, it can be shown that the idea of the *Rechtsstaat* persists—for the formal security of the freedom of all—but that it is supplemented on a case-by-case basis by the material

determination of general welfare. This happens in recourse to the traditional tasks of an absolutist rule or in anticipation of the solution to the growing social problems.

Thus the BROCKHAUS of 1820 points out that it is "one-sided to determine right or security or prosperity as the sole purpose of the state." The 1836 edition expands the task of the state to "the promotion of all human purposes, to the development of all forces and talents of a people, its education... to true freedom, to the mastery of nature"—all this beyond the preservation of justice. "Even the least among the people must become aware that the state exists for his sake." Similarly comprehensively, PIERER in 1836 defines the purposes of the state, and the democratic MEYER in 1852 moves furthest from the formal theory of the rule-of-law state: "The state is a social institution for the preservation and promotion of the common good of men."

The greatest effectiveness in spreading the idea of the rule-of-law state was exerted by ROTTECK and WELCKER, whose "Staatslexikon" proclaimed a political creed under which the liberal party was to rally. The "timeless idea of reason of the state, i.e., of the *Rechtsstaat*," forbids any neutrality and demands a clear option against positive and historical law, which only favors the holders of traditional power, "to abuse it." Precisely with its formal claim to universality, the concept '*Rechtsstaat*' becomes a battle cry as long as it is not realized. Thus, in the name of the state in general, the concrete state is put under pressure. It should at least introduce the "constitutional system," in which the "*Volksrepräsentation* of the educated active citizens" can ensure that "the greatest possible freedom prevails." It was in the nature of this supra-historically founded legal system that it "naturally could not be subject to any arbitrary majority of votes." Despite this dogmatic narrowing, which in the following period was increasingly criticized and ideologized, historically and sociologically relativized, 'rule-of-law state' maintained itself as a leading lexical concept. It only faded to the extent that its postulates were realized.

The BROCKHAUS of 1886 registers 'Rechtsstaat'—long since naturalized—as an "opposition concept to the police state," and in the 1898 edition, devoid of any transcendental justification, "the securing of right, the care for the welfare of all, and the promotion of the spiritual and moral cultural tasks of men" are lined up next to each other as state purposes. How much the concept 'Rechtsstaat' had lost its function as a battle cry of the liberal party is shown by WAGENER, who at first apostrophized it as the "so-called Rechtsstaat" in order to supply the "conservative party" with arguments, but in 1865 had to use it quite naturally as an equivalent for the "modern state." MEYER finally classified the concept, in an ideology-critical manner, as belonging to the "Manchester theory," in which meaning it was "hardly cultivated anymore." Rather, it had become synonymous with "constitutional state," which sets limits to state power. With its legal-technical positivization, the formerly emphatic concept has also lost the theoretically demanding problem horizon, as Kant once unsurpassably formulated it. The victory of the liberals was, as the lexicon level shows, at the same time their defeat.

c) Kulturstaat (Cultural State). An expansion of the concept of the rule-of-law state is present in the equally specifically German 'cultural state' (*Kulturstaat*). It rarely appears literally, but is always co-intended where a state of nature is presupposed as preceding the state, or where the state of nature is denied altogether. Thus, for PÖLITZ, the state is primarily a "legal institution," but because of its "ethical implications" also an "educational and cultural institution." For BLUNTSCHLI/BRATER, the state as a "human creation... is a cultural concept, not a concept of nature." And this expansive, always also extra-political concept was all the more popular as it could at the same time co-mean the

historical-cultural achievement of a respective people. In this definition, the state is an "ensouled cultural being" or in a phrase by WAGENER: "the living organization of the people's life and its culture."

d) State and Society. When asked whether the society of individuals is conceptually prior to the state, whether it is conversely subordinated to the state, or whether both are thought of integrally, as the organism metaphor suggests, the lexicons are ambiguous. Compromise formulas predominate.

Already the semantic equation of 'state' and 'society', which remains in the Aristotelian-Ciceronian tradition, speaks against a consciously accepted separation of the two spheres. Thus, the BROCKHAUS of 1820 equates "state with civil society," in 1836 it is still "state or civil society," the ROTTECK/WELCKER speaks of a "*Staatsgesellschaft* (state society)." Behind this can stand decidedly liberal principles—BROCKHAUS: "The preservation of freedom and property is the purpose of every state constitution," or emphatically in ROTTECK/WELCKER: "The life of the state exists only through the voluntary coexistence of members who are free individual personalities and have a purpose in themselves." But against such views, the BROCKHAUS already turns two years later; the state or the "public power" thus becomes the "servant of the, as it were, atomistic masses," and the liberal state contract dissolves into the "agreement of a multitude of men...to want to form (found or continue) a state among themselves."

In the measure that the view of the historical school prevailed against the contract theory, the people takes the place of society, which the Brockhaus of 1847 first notes, still with a slight democratic intonation (cf. at note 198). In 1854 it then says: "State. If one thinks of the human community as an organically living whole and accordingly understands by the people the individuality of this whole in custom, law, and society, an individuality that rises to nationality through the consciousness of the same: then the state will be the personality of this individual nationality, which has developed an independent organic will within itself."

In place of the society of individuals comes the community of the people, which constitutes the state. BLUNTSCHLI/BRATER also adopt this approach as the "correct insight of the historical school" and expand it with the terminology of Rohmer's psychology. The "sum of individual spirits" does not produce a "common will"; only in the "race spirit and the race will" lies the "disposition for the state spirit and state will, to which the individual rightly subordinates his particular will in all common things. In the race is rooted the state drive," whereby for the first time a naturalistic-speculative concept of the state was introduced.

Lexically, the separation of state and society is no longer posed as a question of political theory. It is occasionally registered, as in 1852 in the BROCKHAUS with reference to Riehl's "Civil Society" (1851): "Modern usage sometimes distinguishes between state and society or civil society and understands by the latter the coexistence of men and the relationships that develop from it on their own and without the intervention of state power, e.g., of the various estates and professional classes, the opposition of employers and workers, producers and consumers."

The last time a theoretical concept formation is offered is by the Brockhaus of 1868. It starts from a "science of society," which also includes the "science of the state." According to the "duality of the human personality," being always private and public, there are two main types of (all) human associations: The

"associations or communities," in which individuals "unite and develop freely morally, intellectually, and in materialistic respects." The other type "joins together into corporations or collective persons," knows a "free subordination of the respective representatives under the idea personified by them,... if necessary, also legally enforceable institutions. It is this society that is called a state." This is certainly a liberal concept formation, which still draws on its idealistic origin, but which has already given up the normative elements in favor of a social-scientific description. Therefore, it can it can also dispense with the organism metaphor, which is otherwise gladly called upon as a conceptual stopgap.

e) Organism Metaphor. The organism metaphor was suitable for bringing state and society together, for integrating evolutionary doctrines as well, and also for including the family—more rarely the estates—as a "natural" element in the concept of the state.

ROTTECK/WELCKER speak in a historical perspective of the "state organism" or of the state as a "man writ large," but express reservations from their individualistic and consensualist viewpoint against the "merely poetic and playful comparison of the state with an organism." Nevertheless, for them too, the "final purpose of the state society" requires for its realization a "corresponding harmonious and firm state body."

BLUNTSCHLI/BRATER push the metaphor decidedly further when they speak of the "organic nature of the state" and define the "personality of the state" as an "organism of the highest kind"; it was a "person, admittedly not a corporeal person in the natural sense, but a moral-spiritual person in the sense of law and culture." And with the additional help of a naturalistic gender metaphor—the church being the "mother"—they summarize: "The state is the masculinely organized people of a country, which has become an independent person that rules over the (*Volk eines Landes*) common life."

After the state, once derived from society, had become an independent organic personality, it gained an ontological precedence, had, as it were, a character of eternity and could therefore (quite unhistorically) also be transferred to all historical periods, as the historical reviews of the lexicons do. And it was also no difficulty for the conservative WAGENER—he propagated the "Christian-Germanic state," the word "*Volk*" was an "abstraction," only the "*Stände* (estates)" were "reality," the "authority" was "by the grace of God"—to mediate all his determinations "organically": "What we call a state" was "the community of men elevated to an independent organic personality," the "living organization of the people's life and its culture."

Thus the organism metaphor remained elastic enough to blur the boundary between state and society and at the same time to offer the liberal-conservative compromise, at least lexically. But it was always in the logical consequence of the organism metaphor to stabilize the state as an acting person and as an end in itself.

Here too, MEYER raised a solitary but energetic objection in 1852. For a comparative or an immanent analysis of state constitutions, the opposition pair "mechanical/organic," or as the new technical term says, "naturally grown," offered "nothing at all." "Only this much can be very well understood, that the appeal to the organic... 'naturally grown' essentially amounts to a praise of the strictly monarchical principle," of the "paternalistic, family-sprung and family-analogous police state." With this, the

originally anti-'police state' of the 18th century metaphor of the mechanical was polemically turned against that of the organic, in order to unmask both metaphors with ideology-criticism.

REINHART KOSELLECK

IV. German Doctrine of State Law and Constitutional Policy

1. The Starting Point

The history of the concept 'state' in the 19th century is dominated by two facts: "The modern state" is at the beginning of the 19th century a universally recognized, though certainly differently valued, reality. The state, sovereign holder of the monopoly on violence, is conceptually distinct from the prince. The prince has an office; he does not rule as a private person, but as an officeholder; rule is not his private property, but an office entrusted to him. This development from princely sovereignty to state sovereignty can, to be sure, only be understood as a partial segment of the overall development of constitutionalism; such a type of legal construction of state power is, however, by no means a legal constitution in the sense of constitutionalism.

The disputes about what the state should be are determined by the rational-law draft of a constitutional state with separation of powers. For the liberal-constitutional currents, the binding nature of this draft is self-evident; the liberal constitutionalism of the 19th century is a continuation of the rational law of the 18th century. But also all conservative, "reactionary" state theories can be read as a response to the draft of the constitutional state; the executive power, which "is exercised according to the law by the regent of the state (*rex, princeps*)," and for the judicial power ("as the attribution of what is one's own to each according to the law") in the person of the judge. This is the basic structure of a republican constitution, which is characterized by the "state principle of the separation of the executive power (the government) from the legislative and from the judicial". Its actual meaning is the greatest freedom of the individual. These are *a priori* principles—"it is a theory of state law, without agreement with which no practice is valid".

The state that was designed here has been called a *Rechtsstaat* (rule-of-law state) since the beginning of the 19th century. Because of the extraordinarily confusing politics that have been conducted with this concept of *Rechtsstaat*, a neutral expression, compared to the controversies of the 19th century, is recommended here ; in the following, we use the term *Verfassungsstaat* (constitutional state)—which, although demonstrable in the 19th century, has only become common in more recent times—for the rational-law draft characterized by comprehensive legal binding of state organs, separation of powers, freedom of the individual, and legislation by representative organs of the *Volk* (people).

3. The Dispute over a Representative Constitution in Prussia

The will for a *Verfassungsstaat*, which Kant had clearly formulated in the German tradition, became actualized in the individual German states even during the Wars of Liberation, and with particular

emphasis after the victory over France. The example of France, where the initially constitutional-state draft had been overrun by a Jacobin reign of terror, urged great caution ; nevertheless, the constitutional impulse remains clear: comprehensive legal binding of the prince, separation of powers, legally guaranteed freedom of the subjects, and their political participation in a representative system. In this context also belongs the promise of a constitution given by FREDERICK WILLIAM III in 1815. It has been pointed out that this constitutional promise remained ambiguous as to whether the constitution was to be ständisch (based on estates) or "representative".

However, two things were clear: first, that in the later words of MOHL, "the old *ständisch* constitution and the representative *Rechtsstaat* are essentially different state ideas and were also regarded as such by contemporaries" ; and second, that the intention of the political forces pushing for a constitution was clearly aimed at the representative constitution of a *Verfassungsstaat*. The struggle of the Old-*Stände* (old estates) against Hardenberg is proof of this. The advocates of a constitution appeal to the tradition of *Vernunftrecht* (rational law); the opponents of a constitution accuse *Vernunftrecht* of its ahistorical way of thinking and appeal to historical law. Two of these anti-constitutional conceptions are highlighted here because of their constitutional-political impact and their theoretical significance.

4. The Old-*Ständisch* Idea of the State and the Old Law of Brandenburg-Prussia

MARWITZ, the spokesman for the old-*ständisch* opponents of Hardenberg, invokes against the idea of a representative constitution—it is based on a "foreign viewpoint," is of French origin—the "hitherto existing old Brandenburg-Prussian state". The essential difference between the two conceptions of the state lies in the handling of law. "We believe we must place the essential difference of the foreign viewpoint, i.e., of the idea from which the foreign laws proceed, with that peculiar to our country, in that the foreigners always consider only the moment, and since they respect neither the past nor the future, they always find a great mass of means to achieve the present purpose. Thus, if any law of the past opposes them, it is overturned and a new one is made for the present case, which soon must give way to another. If any constitution of the country is childish to them, a new one is immediately made, which soon fares the same; and since nothing hinders them but the attachment of the peoples to their laws and constitutions, it is quite natural that their primary endeavor is directed at destroying this attachment". HARDENBERG's note on this passage reads: "Ask the great majority of the *Volk* whether it is attached to the hitherto existing *ständisch* constitution, whether it sees its salvation in it? Much less in the one you are trying to derive from old times and completely changed circumstances". This comment reveals the decisive weakness of Marwitz's argumentation. MARWITZ does not want to leave it at the traditional constitution, but rather to derive an "old" constitution from "old times and completely changed circumstances"—in essence, to invent a new "old" constitution. Hardenberg refers to the view of the "great majority of the *Volk*"; this, by the way, proves that Hardenberg cannot be addressed here simply as a representative of a "modern-bureaucratic" conception of the state. Marwitz continues: "In this way, our state was comparable to a large family, in which the father enjoyed the highest trust of all family members, and in which all strove to establish the prosperity of the house also for their descendants. Those other states, however, seem to us to resemble an Indian plantation, where the slaves are driven to work, and where the master, despite his great power, cannot sleep peacefully for a moment". In the dispute with Hardenberg, Marwitz drafts the clearest picture of the state commonwealth as a *res publica*: "It seemed to us as if it were not made clear enough to the citizen that the state and he were one and the same thing, but rather: as if he were only placed opposite the state, as if the state were a foreign thing to him, to which he

only had to give money and which then took care of itself". Elsewhere, but also in dispute with Hardenberg, Marwitz formulates: "The state consists neither in the regent nor in the subjects, but only in the free and mutually pervading life of the government and the subjects. Where this does not take place, no state exists at all". Therefore, a despotism is not a state. Marwitz knows that he is basically arguing against the history of Prussia here: "Our fatherland has long been no state, for the constitution and the civil law have not developed out of and through each other and perfected themselves, but the former has been forgotten, the latter has been arbitrarily determined". He explains this "forgetting" of the constitution thus: The constitution of the Mark, as in all of Germany, was republican, whereas the Roman law valid in the Mark since 1534 was thoroughly despotic. "How could two elements, in direct contradiction to each other, happily and peacefully achieve a common goal? By republic we understand... a commonwealth, a state. By despotism, however, an unlimited absolute rule, a non-state. A monarchy can, according to this, very well be a republic, or more precisely, it must be so, for the monarch in it is a citizen like the subjects". The fundamental contradiction lay in this: Marwitz demands orientation towards a historical law that, by his own admission, had already become obsolete centuries ago.

5. A Scientific Justification for the Historicity of Law and Constitution

If one tried to turn historical law against the idea of constitutional legislation, it was one political option against another, without the historical view having any prospect of breaking the rather broad consensus on the necessity of a constitution. This only changed when the "historical view" no longer appeared in the guise of a political postulate, but could present itself as the indubitable result of pure science. This happened in SAVIGNY's work, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (On the Vocation of Our Age for Legislation and Jurisprudence), a work whose constitutional-political significance has long been paid too little attention.

Ostensibly, this work is a response to Thibaut's demand for a uniform civil code for the German states ; this demand was merely the occasion for Savigny's work. In its actual content, it was nothing less than a comprehensive counter-draft to *Vernunftrecht*, on whose ground the idea of the *Verfassungsstaat* had arisen. Savigny did not fight the idea of the *Verfassungsstaat*; he demonstrated its scientific untenability. The rational-law tradition shrank in Savigny's work to the single sentence: "Law arises from laws, from express prescriptions of the highest state power" ; in truth, according to Savigny, the "actual seat of law is the common consciousness of the *Volk*," "law thus grows with the *Volk*, develops with it". With increasing culture, however, "all activities of the *Volk* become more and more separate, and what was formerly done in common now falls to individual *Stände* (estates). As such a separate estate, the jurists now appear". Law now takes on a "scientific direction, and as it previously lived in the consciousness of the entire *Volk*, it now falls to the consciousness of the jurists".

Savigny does not directly touch on questions of the state constitution; he only mentions in passing that "as with law, so it is with language, custom, constitution". After this theory of the origin of law, it was self-evident: If one cannot create law, then one certainly cannot create a constitution either. And it is difficult not to see in the representation of the *Volk* by the scientific jurists a targeted counter-program to the representative constitution.

6. Substitute Forms of the *Verfassungsstaat*

The constitutional-state draft could not be implemented in 19th-century Germany. And yet it decisively determined the specific character of the victorious conservative constitutional policy. This policy rejected the model of the *Verfassungsstaat*, but adopted essential partial elements from this model. On the basis of the given monarchical sovereignty, a multitude of substitute forms for the *Verfassungsstaat* developed.

a) Civil Legislation. The earliest substitute form of the *Verfassungsstaat* had been the civil legislation inspired by the spirit of the Enlightenment. SVAREZ, the creator of the *Allgemeines Landrecht für die preußischen Staaten* (General State Law for the Prussian States), had outlined the objective of this codification as follows: "Civil legislation should, in a state that has no proper fundamental constitution, to a certain extent replace it". The civil freedom granted by the codification was intended as a preliminary stage, not as a final, but only as a temporary substitute for a political freedom to be realized by the *Verfassungsstaat.*

b) *Rechtsstaat* as a Moral Postulate. Another substitute idea for the *Verfassungsstaat* goes back to KANT himself: "The change of a state constitution that does not correspond to the a priori principles of the *Verfassungsstaat* can only be carried out by the sovereign himself through reform, but not by the *Volk*, and therefore not by revolution". For the transitional period until the introduction of the *Verfassungsstaat*, Kant recommends that monarchs: "rule autocratically and yet govern republicanly, i.e., in the spirit of Republicanism and by analogy with it". This motto: "despotic in the form of the state, i.e., absolutist, but republican in the manner of government," characterizes a *Rechtsstaat* that, deviating from the unabridged concept of *Verfassungsstaat*, understands itself only as a moral appeal to the good will of the ruler. A voluntary self-limitation in the exercise of absolute rule is suggested to him. The rule of law (*Rechtsstaatlichkeit*) is understood here as a moral postulate, not as a legal command.

When after 1820 the principle of absolute rule, established in Art. 57 of the Vienna Final Act, had to be brought into concordance with the existing constitutions of the southern German states, the following interpretation, according to this Kantian model, presented itself: The constitutions were granted by virtue of sovereign will; they did not abolish state-law absolutism but were an expression of this absolutism—in terms of the form of the state, rule continued to be despotic. In terms of content, however, these constitutions represented a concession to constitutional-state tendencies; they were a compromise with bourgeois demands for representation, for more equality and freedom—so they were, *cum grano salis*, republican in their form of government.

c) The Autonomy of Law. Savigny's fight for a handling of law monopolized in the hands of the legal profession, his fight against the "arbitrariness of the legislator," against a national law code as Thibaut had proposed in 1814, was centrally aimed, as explained above, against constitutional-state postulates, against the ideas of equality and freedom, against the idea of a representative constitution. But Savigny's doctrine of the origin of law from the *Volksgeist* (spirit of the people) and of the necessity of a further development of law solely by the legal profession also had a positive significance ; its compelling consequence was a comprehensive autonomy of a strictly scientifically working jurisprudence and a jurisprudence oriented towards it, against all other interventions in the autonomous legal sphere. Absolutist power decrees of the ruler had no place in Savigny's concept of judicial policy. In this way, an important partial element of the *Verfassungsstaat*, the independence of the judge, was almost imperceptibly proven theoretically as compelling and indispensable. And this without any recourse to the proscribed doctrine of the separation

of state powers, which was rejected by Art. 57 of the Vienna Final Act. The "independence of the law, its unavailability to political authorities, became virtually the backbone of conservative legal and state views".

d) Bureaucratic State (*Beamtenstaat*). Another substitute model for the *Verfassungsstaat* was, especially in Prussia, the *Beamtenstaat*, at least for the *Vormärz* period. An enlightened bureaucracy was the carrier of the reforms in Prussia under Stein and Hardenberg. Since in Prussia the constitutional promise of Frederick William III from 1815 was not fulfilled, these reforms were denied the framework in which their constitutional-state content could have been fully represented. A reform-conscious bureaucracy thus felt a special duty: "in a state in which they (i.e., the officials), without the counterweights of a free press and constitutional institutions, are to solve the immense task of representing their place". This substitute function of the *Beamtenstaat* overtaxed the possibilities of the bureaucracy. The officials continued the reforms in the direction that remained possible in the era of Restoration ; they acted essentially, since the path to more political freedom was blocked, for more economic freedom. The most significant achievement here was the realization of the German Customs Union in 1834. Economic liberalism instead of constitutional liberalism—that marks the limits of the substitutability of the *Verfassungsstaat* by the *Beamtenstaat*. These limits of the substitute function of the *Beamtenstaat* were recognized early on. They were already formulated in 1831 in a famous motion of the Westphalian provincial diet, which was drafted "with the supportive tolerance of the old Stein," and which "publicly questions the advantage of the administrative state over the Western constitutional states, especially after the Belgian Revolution".

According to a statement reproduced in ROTTECK/WELCKER, the "Prussian civil servant class comprises the most educated, intellectually most emancipated part of the nation". This is followed by a word from MEVISSEN (from a speech in the United Diet): "The crown of Prussia has, as long as Prussia has existed, relied on the intelligence present in the state. As long as this intelligence was mainly concentrated and represented in the bureaucracy, it also did not call for estates... but times have moved on, the intelligence that was formerly predominantly found in the bureaucracy is today found outside of it; the bureaucracy today represents only a part of this intelligence". The deputy Mevissen later drew the consequence from this realization in the United Diet: "The development of history, however, is that the *Volk* is pushing beyond these limits of the bureaucracy". This is precisely what the substitute function of the *Beamtenstaat* means, which could realize economic freedom but had to accept political unfreedom.

e) The Legal Personality of the State

The doctrine of the legal personality of the state also appears as a substitute for constitutional-state demands. The essence of this doctrine is: The state is legally constructed, but not legally constituted—it is to this extent a *Rechtsstaat*, not a *Verfassungsstaat*. The doctrine of the legal personality of the state initially has a legal-technical side. The question arises, against whom are the rights of the citizen directed, who can assert the duties of the citizen against him. The answer: this is not the ruler (who only has an office), but the state. Because the state is thus the subject of legal norms that entitle or oblige it, it presents itself as a legal person, a legal entity. This conclusion is not compelling, but it is plausible; it has been drawn by jurisprudence in Germany as well as in other continental European countries. Characteristic of the German tradition, however, is a very particular emphasis with which this doctrine of the legal personality of the state has been advocated, remarkably with the aim of opposing the assumption of the

citizens' rights of freedom. This tendency is most clearly expressed in the well-known review by ALBRECHT of Maurenbrecher's "Principles of Modern German State Law". Albrecht picks up on a linguistic usage he has found. He emphasizes that the basic views he has developed on the *Rechtspersönlichkeit* (legal personality) of the state, "more or less clearly expressed, appear frequently, but it is just as certain that they have not yet been recognized in their true meaning." He wants to try to make "the already commonplace phrases about the legal person of the state, about rights, property, actions, and duties of the state fruitful in their rich consequences for (the) construction of *Staatsrecht* (state law)." Here it is once again expressed that the recognition of the state's autonomization from the *Fürsten* (prince) has become indisputable. Everyday usage already speaks of the rights and duties of the state, not of the regent. The older view, which he describes as private-law-based, which knows no separation of office and officeholder, no separation of the sovereign rights of the territorial lord and no private rights, he considers unworthy of refutation; he simply connects with the more recent linguistic usage. In order to correctly grasp the rights and duties of the state, one needs the construction of the state-person, and he shows the consequences that lie in this construction: "We nowadays think (at least this can be regarded as a predominantly prevailing view) of the state not as a union of men, which is solely and directly calculated for the individual purposes and interests of the same, be it of all or many, or even of a single one, namely perhaps the ruler, but as a commonwealth, as an institution, which, standing above the individual, is primarily dedicated to purposes that are by no means merely the sum of the individual interests of the ruler and the subjects, but form a higher, general total interest." For the rights of the ruler, it follows from this: "As head of the state, he also acts only in the name and service of the state; he does not have rights for his own sake; he has rights only as an independent individual." This is nothing other than the modern distinction between 'officeholder' and 'private person'. And now comes an extremely consequential step: Albrecht wants to make this distinction not only for the ruler, but also for every other citizen; where the citizen acts as a private person, as an independent individual, there he has rights for his own sake; but it is different when it concerns him as a member of the state—we would say today, as a *Staatsbürger* (citizen of the state)—there he has no rights whatsoever. And Albrecht draws the consequence from this: "By thus... denying the individual all independent legal personality (the being-entitled-for-one's-own-sake), we are necessarily led to attribute the personality that rules, acts, has rights in this domain, to the state itself, and therefore to think of the state as a legal person; and this, correctly understood, the reviewer considers to be the basic formula of that conception of the state which he has called the truly state-legal one." This means: in public law, there are no individual rights, no rights of freedom for the citizen, and precisely for this reason the state is attributed legal personality! What was new was not the recognition of the state's autonomization from the prince; nor was a legal construction of the state as a legal person new—what was new in Albrecht's work was merely the connection between the doctrine of the state's legal personality and the denial of the individual's subjective public rights. In place of the constitutional-state idea of the legal binding of state organs through the citizen's rights of freedom comes the doctrine of the state's legal personality as an "institution standing above the individual".

f) Southern German Constitutionalism

The most significant approximation to the idea of the *Verfassungsstaat* was accomplished through the enactment of constitutions in Bavaria, Baden, Württemberg, and Hesse. The constitutional-state tradition of thought aimed at constitutions that were supposed to realize a legal binding of the regent: "It belonged essentially to a legal state... that the head of state stand under laws". The given constitutions of the southern German states did not correspond to this model. They were granted by sovereign authority.

MARWITZ had already remarked during his fight for the "old" constitution of Brandenburg-Prussia: "A given representation is no representation at all, for just as it is given, so can it also be taken away". Indeed, the binding character of the granted constitutions for the constitution-giver—the regent—had to remain doubtful. The constitutions did not implement a separation of powers. Thus, the Bavarian constitution of 1818 stipulated that "the King as the head of the State unites in himself all rights of state power and exercises them under the provisions given by him and established in the constitution". The constitutions of Baden and Württemberg contained similar provisions. Art. 57 of the Vienna Final Act aligned the constitutions of other states with this line: "Since the German Confederation, with the exception of the free cities, consists of sovereign princes, it must, according to the fundamental concept thereby given, be that the entire state power remains united in the head of the State, and the sovereign can only be bound in the exercise of certain rights to the cooperation of the *Stände* by a territorial constitution".

With this, it was established that the given constitutions were only to be regarded as reluctantly granted concessions to the constitutional currents. Princes and governments sought to weaken their validity as much as possible. MOHL has highlighted the significance this circumstance had for German conservatism: "The preserving forces did not see their task in upholding the already existing development of the fundamental laws and only preventing precipitations by means of innovation-seeking and as yet untried attempts; rather, the conservative direction in Germany goes so far as to hold back the complete development of the norms already expressed in the fundamental laws". Conservatism was thus primarily oriented towards the state, not the constitution.

7. *Rechtsstaat*

The demand for the *Rechtsstaat* initially has a clear liberal-constitutional character; it is the epitome of constitutional-state tendencies. It means a position for the legal binding of state power, for the separation of powers and fundamental rights; against princely sovereignty, the police state, and absolutism. But then, around the middle of the 19th century, the concept of '*Rechtsstaat*' is also taken up by conservatives. It then means: a surrogate for the *Verfassungsstaat*. After this conservative reception of the concept of *Rechtsstaat*, it was no longer suitable for designating the positions in the fundamental constitutional-political conflicts. The *Rechtsstaat* no longer had opponents, but only supporters, who each understood fundamentally different things by it.

a) The Liberal Concept of *Rechtsstaat*. Programmatically, the concept of '*Rechtsstaat*' appears in MOHL's monograph, "*Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*" (The Science of Police according to the Principles of the Rule-of-Law State). Mohl places the *Rechtsstaat* in a series of state types that are formed by different views of life: "The religious orientation of the *Volk* corresponds to theocracy, the sensually stunted to despotism, the private-law demand to the patrimonial state; the simple family view to the patriarchal state; the sensual-rational purpose of life to the *Rechtsstaat*". Of these "state types," only the *Rechtsstaat* could find a closer examination: "The starting point of the view of life on which it is based is the individual. Man can rationally find no other purpose for earthly existence than the most complete and thus even development of all his dispositions and forces". "But what everyone in the *Volk* wants and strives for must also be the will of the whole society, and the order of their coexistence, i.e., the state, must not only not hinder this purpose, but on the contrary, promote it. A *Rechtsstaat* can therefore have no other purpose than this: to order the coexistence of the *Volk* in such a way that each of

its members is supported and promoted in the most free and comprehensive exercise and use of all his powers. What this support and promotion consists of is easy to see. The freedom of the citizen is, in this view of life, the supreme principle".

A similarly close connection between *Rechtsstaat* and individual freedom is found in WELCKER: "In the despotic state, the subjects are serfs, in the theocratic, will-less minors, in the *Rechtsstaat*, free citizens". Welcker makes the rational-law origin of the *Rechtsstaat* clear: "the law of reason (justifies) the *Rechtsstaat* or the free state,... the rational-law free constitution of the *Rechtsstaat*". He praises the *Rechtsstaat*: "the highest development of the most sublime work of art, that of the free state, this freest, greatest deed of the peoples". In the fundamental debates of the Frankfurt National Assembly, the concept of '*Rechtsstaat*' is generally used in the sense of '*Grundrechtsstaat*' (a state based on fundamental rights); accordingly, the '*Rechtsstaat*' is the state that norms individual freedom, which is to be protected by fundamental rights, as the highest value. The counter-concept is '*Polizeistaat*' (police state).

Thus, the deputy LETTE states: "If the adopted fundamental rights... had already permeated the political consciousness of the nation and the state organism, then the most important principles on which we have to build the new *Rechtsstaat* would be established." The deputy SPATZ wished for a fundamental clarification in the constitutional text, "that everyone is authorized to do everything that is not forbidden by the laws," and justifies his motion: "This addition is necessary because we have hitherto lived in a police state, and because, even if we are now transitioning from the police state to the *Rechtsstaat*, very many officials will be carried over who have grown fond of the previous practice of the police state". In the same sense, the deputy NAUWERCK: "We can no longer tolerate the old way, that everything is forbidden that is not allowed... The police state is a thing of the past, and I hope it will never return". Droysen quotes a statement by the deputy AHRENDS on the freedom of science: "here too, the police-like nature of the state must cease". He further quotes a statement by the deputy ANDRIAN-WERBURG regarding the relationship between state and church: "here, with the abolition of the police state, a serious start must finally be made". The deputy REINHARD speaks of "servants of the state, not, of course, of the old police state, but of the new one, in which justice is replaced by righteousness!".

b) The Conservative Understanding of the *Rechtsstaat*. Liberals and democrats fought in the revolution of 1848/49 for the constitutional-state draft of the *Rechtsstaat*. The question arises, for what contents did the conservatives stand in the constitutional struggle of these years. They represented neither the idea of the absolute state nor that of the police state. They too fought for the *Rechtsstaat*—the *Rechtsstaat* as it had developed as a surrogate for the *Verfassungsstaat* while maintaining the external form of "absolute" rule. Both sides thus fought for the *Rechtsstaat*. The ones meant by it the developed *Verfassungsstaat*, as it was then reflected in the draft of an imperial constitution and in the catalog of fundamental rights; the others, that complicated surrogate structure that had incorporated a series of enlightening, liberal, constitutional-state contents, but had not touched the monarchical principle.

The position of the opponents of the 1848 revolution was most pregnantly formulated by FRIEDRICH JULIUS STAHL. All the contradictions and tensions contained in the conservative concept of the '*Rechtsstaat*' are found openly expressed in Stahl's work. "The state is through and through a public matter", thus not, for instance, the private property of the prince. However: "The rule of the state, and thus the state itself, becomes personal in the king". But this personification alone is not sufficient to describe

the essence of state rule. This rule, namely, has a "double element. On the one hand, the authority or state power (*imperium*), i.e., the power that is exercised by men; and on the other hand, the law (*lex*)". What is the relationship between king and law? Here it becomes apparent that Stahl takes up the constitutional-state demand for a legal binding of state power: "It is therefore necessary that the law also be a power in the state, which the king cannot suppress, from which he cannot detach himself". He immediately adds a sentence, however, that calls the legal binding into question again: "But the law cannot and must not be the only authority... The king is no less an authority, and he rules by virtue of this his authority, not in the name of the law... They (i.e., the subjects) have to obey him, not because he commands and executes what the law prescribes, but because he is the king". If the king, as the personification of the state, possesses an original authority not derived from the law, then the demarcation from absolutism becomes difficult. "If, according to this, the originality and independence of power lies in the essence of kingship, then by no means its unlimitedness... It would be against the essence of the state". Stahl sees the character of the European monarchy in the fact that "the prince is limited by rights of the subjects and of the *Volk*, and precisely thereby it is a monarchy in distinction from despotism. Here, the limit of the princely power is generally and necessarily the law and the independent judges; in a higher constitutional development, also the state offices as necessary intermediate organs and finally the representation of the country. Through these elements, the princely power is completed into a full state institution, but all completion is at the same time a limit; for only the whole is unlimited".

The unlimitedness of the state as a whole thus takes the place of the unlimitedness of the royal power. With this, the relationship between state power and law ultimately remains unclear. This ambiguity is, so to speak, covered by the basic principle that all state power springs from the essence of the institution 'state' and is accordingly limited and determined by the purpose of this institution. It constitutes the essence of the state, as an ethical realm, that an ethical power is established in it over the *Volk* (people). Nevertheless, it is true that the state indisputably rests ultimately on the will of the *Volk*. But for Stahl, this does not mean the empirical will of the *Volk* as a result of the will of individuals; it does not mean an arbitrary wanting, but a consciousness of ethical necessity, a continuous ethical-legal will that has at the same time hitherto been realized in the formation of the state, and is therefore also bound to the traditional laws and the traditional authority.

In view of this conservative reception and reinterpretation of the concept of *Rechtsstaat* (rule-of-law state), it becomes understandable why a liberal like MOHL becomes dissatisfied with the concept. Mohl believes that the designation *Rechtsstaat* is "not a happy one in more than one respect, particularly not a complete one;" but it seems better to retain the widely used one, in order not to cause confusion. This characterization of the *Rechtsstaat* as "not a happy, particularly not a complete designation" is accurate precisely because the concept of *Rechtsstaat* did not express the actual difference between the *Verfassungsstaat* (constitutional state) and the legally tempered legacy of absolutism, and thus could be claimed by both parties in the dispute. Those who meant the "actual" *Rechtsstaat* of the *Vernunftrecht* (rational law) tradition indicated this—even before the defeat of 1849—through paraphrasing clarifications: "the rational-law free constitution of the *Rechtsstaat*."

8. Withering Away, Abolition, Smashing. Death of the State

Towards the middle of the century, even before the revolution of 1848, a significant change occurs. The question of the right constitution for the state is replaced by the question of whether a state is necessary at

all: "And why does it (i.e., the state) not want to dissolve completely?" With this, the constitutional question, which had been at the center of all *Vernunftrecht* considerations since the beginning of the modern state, is declared obsolete. At the same time, it becomes clear that 'state' lives on the question of the right state constitution—if it is no longer asked, 'state' can only be thought of as 'withering away'. The turning away from the state does not only take place in Germany, but receives a specific intensification among German writers, insofar as they have no hope for a further development of the given political condition. ENGELS later formulated this, with regard to the necessity of revolutionary violence, as follows: "One can imagine that the old society could peacefully grow into the new one in countries where popular representation concentrates all power in itself, where one can do constitutionally what one wants, as soon as one has the majority of the *Volk* behind one." Engels sees such beginnings in democratic republics like France and America, in monarchies like England, but in Germany, there are no signs of it.

Such pessimism is not only found after the defeat of the constitutional movement in the revolution of 1848. It appears even before; it virtually anticipates the defeat.

a) Stirner. An example is the rejection of the state in MAX STIRNER's work "*Der Einzige und sein Eigentum*" (The Ego and Its Own) (1844). For Stirner, the (actual) state is characterized by the relationship of master and servant. The bourgeoisie only spiritualizes and rationalizes this relationship of dependence by installing the law as master. It has tried to revolt against the existing state, to overthrow the existing laws; but "to sin against the concept of the state, not to submit to the concept of the law, who would have dared that?" An impersonal specter was made master instead of a natural person: "Political liberalism abolished the inequality of masters and servants; it made masterless, anarchic. The master was now removed from the individual, the 'egoist,' to become a specter: the law or the state." Stirner sees nothing but state-worship in the question of the right state constitution: "State! State! So went the general cry, and from then on one sought the 'right state constitution,' the best constitution, thus the state in its best version. The thought of the state entered all hearts and aroused enthusiasm; to serve it, this worldly God, became the new divine service and cult." While political liberalism may have abolished the political inequality between master and servant, the desired state was nevertheless to remain a bourgeois state, a state as the protective power of the propertied. Social liberalism, on the other hand—meaning the socialist movement—abolishes the inequality of property: "Property is taken from the individual and handed over to the spectral society." This transfer means nothing other than "the master as state" rises again and the purpose of all liberation is thwarted: "That dissolution should indeed benefit me, otherwise it would only belong in the series of countless dissolutions which, for the benefit of others, e.g., precisely of man, God, the state, pure morality, etc., declared old truths to be untruths and abolished long-cherished presuppositions".

b) Nietzsche. NIETZSCHE's statements on the concept and essence of the 'state' can hardly be overestimated in their importance; in him, the contradictory themes are formulated that are then varied in the following generations. Full of aversion to the state, yet convinced of its necessity; seeing in the democratic state the death of the idea of the state; protesting against the usurpation of culture by the state in the concept of '*Kulturstaat*' (cultural state); finally, the affirmation of the military state as the very last means to uphold a great tradition against the herd type.

In all of Nietzsche's utterances about the state, disgust is expressed, most sharply in "*Zarathustra*": "State is the name of the coldest of all cold monsters... Where there is still a *Volk*, it does not understand the state

and hates it as an evil eye and a sin against customs and rights. The state (is) a hypocritical dog... For it absolutely wants to be the most important animal on earth".

In his early work, the opposition between 'state' and 'culture' is highlighted: "Wherever one now speaks of the '*Kulturstaat*', one sees its task as releasing the spiritual forces of a generation to the extent that they can serve and be useful to the existing institutions: but only to that extent". It is merely "selfishness of the state that makes it desire the greatest possible expansion and generalization of culture". Later, this thought is formulated even more sharply: "Culture and the state—one should not be deceived about this—are antagonists: '*Kultur-Staat*' is merely a modern idea". The democratic concept of the state is seen as the result of secularization; since the separation of the state from religion, religion has become a private matter: "with this, two hostile groups arise: On the one side, the mood of the still religiously moved people changes into a decidedly state-hostile one; they watch the measures of the government, seek to hinder, to cross, to disturb as much as they can, and thereby drive the opposing party, the irreligious, through the heat of their opposition, into an almost fanatical enthusiasm for the state". Irreligiosity, in any case, has the "tendency, for the time being, to create a substitute (for religion), a kind of fulfillment, through devotion to the state". But then that "almost fanatical enthusiasm for the state" wanes, because it becomes clear that this enthusiasm is only a form of religious veneration. The result of this secularization of the state is finally this: "ultimately, the mistrust of all that governs... must drive people to a completely new decision: to the abolition of the concept of the state, to the abolition of the opposition 'private and public'... The disregard, the decay, and the death of the state, the unleashing of the private person (I am careful not to say: of the individual) is the consequence of the democratic concept of the state;... modern democracy is the historical form of the decay of the state".

These considerations direct the view to the origin of the state: "State lies in every insertion of a hitherto unrestrained and unformed population into a fixed form; this could only begin with an act of violence and could only be brought to an end with sheer acts of violence." From its origin, the state is thus a "fearsome tyranny, a crushing and ruthless machinery... some pack of blond beasts of prey". From this origin, Nietzsche concludes for the present: "One should think that a being who looks into the origin of the state would henceforth seek its salvation only at a shuddering distance from it... The state, of shameful birth, for most people a continuous flowing source of hardship, in frequently recurring periods the devouring torch of the human race—and yet... perhaps the highest and most venerable object for the blind and egoistic mass, which has the strange expression of greatness on its face only in the immense moments of state life". "The state is organized immorality." The strong type of man must do things that the herd type considers immoral. Nietzsche's question is: "How is it achieved that a large number (i.e., the representatives of the 'herd type') do things to which the individual would never consent?" "Through the division of responsibility, of command and execution. Through the interposition of the virtues of obedience, duty, love of fatherland and prince. Through the maintenance of pride, severity, strength, hatred, revenge—in short, all typical features that contradict the herd type. The maintenance of the military state is the very last means to either take up or hold on to the great tradition with respect to the highest type of man, the strong type". With such a "military state," the counter-image to the "democratic state" is designed, which, characterized by the predominance of the private morality of the herd man, consistently leads to the "death of the state."

c) Marx and Engels. In the state theory of Marx and Engels, three successive stages can be distinguished: on the one hand, the state as it is today; on the other hand, the state as it will be under the rule of the proletariat; and thirdly, the classless society without a state.

The present-day, "state in the proper sense" is the "bourgeois state"; it is a "machine of class rule," a "bureaucratic-military machinery," a "public power for the suppression of the working class." "The modern state power is but a committee for managing the common affairs of the whole bourgeoisie." This concept of the 'bourgeois class state' applies, of course, only where the bourgeoisie has conquered "exclusive political rule in the modern representative state"; older forms of statehood, shaped not by the rule of the bourgeoisie but of other classes, are disregarded for the development of state theory. Thus, the form of German statehood of this time is in the proper sense irrelevant: "In Germany, where no political state, no state as state, exists." The existing state is analyzed in its most advanced manifestations, while neglecting backward legal forms. This is most clearly expressed in MARX's early work, "*Zur Judenfrage*" (On the Jewish Question); in the discussion of Bruno Bauer's theses on the political emancipation of the Jews—theses that are entirely aimed at the narrow German constitutional conditions—Marx immediately refers to the conditions of the North American free states. For only "where the political state exists in its complete development" can the "relationship of the Jews, and... of religion in general to the state, emerge in its peculiarity, in its purity." And what emerges for him here in the "North American free states" is the essence of the bourgeois class state, which, although it realizes political emancipation—hence the equation political state = free state—does not realize human emancipation. "The limit of political emancipation appears immediately in the fact that the state can free itself from a barrier without man being really free from it, that the state can be a free state without man being a free man."

Another stage of statehood is reached when the proletariat has won political power. The state is then "the proletariat organized as the ruling class." After the experiences of the Paris Commune, Marx considers the clarification necessary: "But the working class cannot simply lay hold of the ready-made state machinery, and wield it for its own purposes." To this extent, the "*Communist Manifesto*" is outdated. For, as Marx wrote to Kugelmann: No longer "to transfer the bureaucratic-military machine from one hand to another, but to smash it, and this is the precondition for every real people's revolution on the continent."

The rule of the proletariat is a class rule, and therefore it is also a state, but it is a "class rule for the abolition of all class rule," which is why the state "truly acts as the representative of the whole society." This, as ENGELS says of the Commune, is "already no longer a state in the proper sense." The proletariat "abolishes all class antagonisms and thereby also the state as state." All means of production become state property; this act of taking possession "is at the same time its last independent act as a state. The interference of a state power in social relations becomes superfluous in one sphere after another, and then dies down of itself."

With this, the final stage is reached: the classes have fallen, and with them the state. "In place of the government over persons comes the administration of things and the direction of production processes. The state is not 'abolished,' it withers away." Similarly, it is already stated in the "*Communist Manifesto*": "The transformation of the state into a mere administration of production." Further details about this final state are not found in Marx and Engels.

From this Marx/Engels scheme, the deviations of, on the one hand, early social democracy, and on the other, the anarchists, can be easily determined. The distance of the state conception of early social democracy from this model is marked, for instance, by a statement from BEBEL: "The state is thus to be transformed from a state based on class rule into a *Volksstaat* (people's state), into a state in which there are no privileges of any kind, and in this state the totality, with the means and forces at its disposal, shall then let cooperative production take the place of individual private enterprises." Here there is neither talk of a withering away of the state, nor of the revolutionary class rule of the proletariat; in its place comes the *Volksstaat*, which, according to Bebel's view, should "first be sought to be brought about through the enlightenment of the masses."

MARX and ENGELS characterize the essential difference between them and the anarchists as follows: the latter wanted to "abolish the political state at a stroke," whereas, according to their conception, it would disappear "of itself and gradually" after the dictatorship of the proletariat. They accused Bakunin in particular of pretending to abolish the state through an authoritarian act, while in reality he was establishing a state: "We thus have all the elements of the 'authoritarian state' beautifully restored, and it makes no difference if we call this machine the 'revolutionary commune organized from the bottom up.' The name changes nothing about the matter."

9. The State and the Social Question. The relationship between the state and the labor question becomes the dominant political theme in the second half of the 19th century. In the revolution of 1848/49, the labor movement had made itself felt, although it did not gain significant influence. The tasks of the state for social organization are addressed in the proceedings of the Frankfurt National Assembly, especially in connection with the discussion of a right to work. The "social republic," for the deputy LETTE, is one of the "favorite theories of the present." The deputy SCHÜTZ explains the significance of the right to work in a catalog of fundamental rights: "it would be the beginning of a new epoch, the possibility that the state, which was formerly a military state, a priest state, or merely a royal state, which is now merely a money state, that human society finally becomes what it should be. If the state were denied the purpose of securing for everyone the exercise of his powers and a corresponding profit,... then it is only the old state, the state of chance, the state of violence."

There are also already answers to the question, later formulated once more by Lorenz von Stein, whether a "social monarchy" could solve the labor question; the deputy SIMON answers it bluntly: "In the principle of hereditary monarchy lie more germs of idleness than in all the beggars of the world... That is my opinion of the 'social monarchy'".

The starting point of LORENZ VON STEIN's considerations is a sharp dualism between state and society. "If we recognize the state as the highest form of the idea of personality and its life principle as the task of bringing about the highest perfection of each individual through its power, then it follows that the state as such, in its innermost essence, is free. Freedom, that is the fullest self-determination of each individual, is the principle of the state; the state cannot be unfree at all... It is therefore an absolute misunderstanding to accuse or attack the state as such in the unfree state." For society, the following holds: "The life principle of the whole society, and thus also of each individual class thereof, is interest. The content of interest is to maintain or improve the given social position. Every better social position, however, is based on the fact that others in other positions are dependent on it. That principle of society thus, by making one class free and independent, makes the second unfree and dependent." With these attributions—state = freedom,

society = unfreedom—Stein, at least superficially, stands in opposition to the liberal basic tendency to see the dangers to freedom in the state and the locus of freedom in society. In truth, there is only a seeming opposition in the core point between this traditional liberal position and that of Stein. For Stein sees the danger precisely in the fact that particular social interests occupy the state. Therefore, the statement that the "innermost essence" of the state is freedom represents a demand that the state must be protected from this encroachment of special social interests. Implicit in this is the idea that the state must be protected from it precisely because only the state can make the superiority of one class legally binding. According to Stein, "unfreedom arises... when the state power is forced to serve a particular social interest." "Now, as the first ruling class in society seizes state power, creates privilege, estate, and caste, and arranges the constitution and administration according to its interest, it brings something into the state that would not be there without it; the state, through this its new form, guarantees an element that contradicts it and its higher idea; it authorizes and protects with its power dependence, while its true nature demands the fight against it." Stein does not see the solution—and this distinguishes him from the liberals of the 19th century—in leaving natural unfreedom as such and only preventing it from becoming legal unfreedom. For Stein knows that from natural unfreedom, legal unfreedom necessarily arises; the social seizure of the state by the respectively ruling class is unavoidable: "Just as there is no element of unfreedom in the pure constitution, absolutely derived from the concept of the state, so there is, according to the above, no conceivable real constitution that does not contain unfreedom, the dependence recognized by the state, in one way or another, in one degree or another." If, then, the dependence of the state on the ruling class in society, and thus legal unfreedom, is inabolishable, how can the "true nature" of the state—the establishment of the independence of each individual—at least tendentially be realized? The elimination or mitigation of the dependence of the lower classes on the ruling classes—this means "social reform"—is only possible if the ruling classes recognize this reform as being in their own interest. "But it is now clear where the principle of all true social reform lies. It is the consciousness in the propertied class of society that its own, highest and well-understood interest demands that it work tirelessly for social reform with all the effort of its social forces and with all the help of the state and its power." Stein speaks of the "republic of mutual interest," of "social democracy," which lies in the struggle with the industrial reaction. The main thing for Stein is social reform; it is secondary in which state-law framework the reform is to take place. The concept 'republic of mutual interest' probably lets it show through that Stein initially thought of the social balance in the state form of the republic. When the monarchical principle had asserted itself against republican tendencies, he transformed the idea of social reform to fit the monarchical givens and spoke of the "kingship of social reform".

The *Kathedersozialisten* (Cathedral Socialists) take up the formula 'social kingship' after Stein. Exemplary is a programmatic essay by SCHMOLLER: "The Social Question and the Prussian State". He expressly connects to the tradition of an enlightened absolutism, albeit *mutatis mutandis*: "Certainly, the kingship today in the parliamentary state, with a free press, free right of association and assembly, cannot, as in the last century, directly take the lead of the lower classes against the propertied classes. The government must take a more neutral position; but it must then also really hold itself neutral above the economic classes". Schmoller summarizes: "A part of advanced liberalism and the largest part of the working class strove for a further radicalization of our political institutions; indeed, universal suffrage, a free press, a liberal right of association and assembly are necessary correctives against the predominant influence of the propertied classes. But the social class struggle will never be pacified by changing the purely political forms of our constitutional life. The freer society as such moves in the state, the greater

the scope for the egoism of the economic classes". The idea of freedom must be combined with the idea of the state: "No, the dangers of the social future can only be blunted by one means: by the kingship and officialdom, these most called-upon representatives of the state idea, these only neutral elements in the social class struggle, reconciled with the idea of the liberal state, supplemented by the best elements of parliamentarism, resolutely and securely taking the initiative for a great social reform legislation and holding on to this idea unwaveringly for one or two generations". The *Kathedersozialisten* speak about the social question from the outside, as unaffected parties. The social movement, on the other hand, is a self-organization of those affected, the workers. Within the working class, the call for individual self-help measures is initially heard (founding of savings banks, invalid, aid, and sickness funds).

In view of such self-help measures, LASSALLE asks the question: "Is it your purpose to make the misery of individual workers more bearable? To counteract the frivolity, sickness, old age, accidents of all kinds, by which individual workers accidentally or necessarily are pushed down even below the normal situation of the working class?... Or is it your purpose: to improve the normal situation of the entire working class itself and to raise it above its current level?"

The improvement of the situation of the working class can in any case only happen by the working class becoming its own entrepreneur, because then that separation between wages and entrepreneurial profit falls away and in its place comes the labor yield as remuneration for the work. Precisely for this reason it is the business and task of the state to make this possible for you, to take the great cause of the free individual association of the working class into its hand, promoting and developing it, and to make it its holiest duty to offer you the means and possibility for this your self-organization and self-association". Such social intervention of the state in no way abolishes social self-help. The real improvement of the worker's situation can only be brought about by that assistance of the state". To justify this state aid, Lassalle explains: "The state has always had to intervene, a single example, instead of the hundreds of examples I could give you, the canals, highways, post offices, packet boat lines, telegraphs, land annuity banks, agricultural improvements, introductions of new branches of manufacturing, etc., in all of which the intervention of the state had to occur—a single example I will give you, but an example that outweighs hundreds, and indeed a particularly close example: When the railways were to be built here, the state had to intervene in one way or another in all German and likewise in most foreign countries, except for a few very small and isolated lines". It is precisely the task and destiny of the state to facilitate and mediate the most tremendous cultural progress". Any remaining concerns against state aid are answered by Lassalle: "Finally, gentlemen: what then is the state?... The two lowest classes, in the most oppressed situation, thus alone form 89 percent of the population, and if one, as one must, also adds the 74 percent of the third, still unpropertied and oppressed class, you get 96 percent of the population in an oppressed, needy situation. To you, therefore, gentlemen, to the needy classes, belongs the state, not to us, the upper *Stände* (estates), for it consists of you! What is the state? I ask, and you now see from a few figures more tangibly than from thick books the answer: Your, the poorer classes', great association—that is the state!".

Lassalle's assessment of the role of the state stands in direct opposition to that of Marx and Engels (see above, Section 8. c). Both approaches work together in the Social Democratic Party (since the unification party congress of Gotha in 1875). - A predominance of Lassallean views is, however, undeniable. Exemplary, for instance, are KAUTSKY's explanations of the Erfurt Program. He states that the tasks of the state are growing day by day. "The economic activity of the modern state is the natural starting point

of that development which leads to the socialist cooperative". Kautsky cites: bank policy, colonial policy, customs policy, railway policy, social policy such as worker protection, worker insurance, poor relief; the economic development also drives the state "to unite more and more enterprises in its hand". However, this by no means implies that "every nationalization of an economic function or an economic enterprise is a step towards the socialist cooperative, that this could emerge from a general nationalization of the entire economic enterprise without anything having to change in the essence of the state. This view—that of the so-called state socialists—is based on a misunderstanding of the state." Like every state system, the modern state is "primarily an instrument for safeguarding the overall interests of the ruling classes". Only "when the working classes have become the ruling classes in the state, will the state cease to be a capitalist enterprise; only then will it be possible to transform it into a socialist cooperative." "Social democracy wants the working classes to conquer political power so that they can, with its help, transform the state into a large, essentially completely self-sufficient economic cooperative." Here, there is no longer talk of a "withering away" of the state, but of its "transformation."

Kautsky summarizes the views of the political opponents: "We should therefore come out with the 'future state,' as one likes to call the socialist cooperative or society... That sounds indeed very plausible, so plausible that not only our opponents, but many among the socialists themselves have asserted the necessity of such a plan... But the drawing up of a plan for how the 'future state' should be set up is not only pointless today, it is also no longer compatible with the current state of science". The opponents of social democracy "babbled about a tyranny of the socialist coercive state." "What these opponents decried as the evil intention of the culture- and freedom-hostile social democracy is a naturally necessary tendency of the economic development in today's society... It is not social democracy, but the economic development, by which the freedom of choice of employment is eliminated as well as the freedom during work". Not the "freedom of work," but the "liberation from work," as the machine system in a socialist society makes possible to a large extent, "will bring humanity the freedom of life, the freedom of artistic activity, the freedom of the noblest enjoyment."

10. *Machtstaat* and Positivism in State Law

With the establishment of the German Empire in 1871, two tendencies are connected: on the one hand, the self-legitimization of the newly formed statehood in the idea of the *Machtstaat* (power state), on the other hand, a saturated constitutional positivism of the doctrine of state law. The overwhelming experience of powerful state unification of Germany shines through when TREITSCHKE defines in his "Politics": "The state is the *Volk* legally united as an independent power... The state is first and foremost power, in order to assert itself. It is not the totality of the *Volk* itself, as Hegel assumed in his deification of the state; the *Volk* is not entirely absorbed by it; but the state protects and encompasses the life of the *Volk*, ordering it externally on all sides. It does not fundamentally ask about disposition; it demands obedience; its laws must be kept, whether willingly or unwillingly... If the state can no longer enforce what it wants, it perishes in anarchy." If for Treitschke the idea of power means "to assert oneself completely and unconditionally," he also gives the concept of independence a pregnant meaning: "It contains, on the one hand, legal independence, in such a way that the state is not at all capable of legally tolerating a power over itself, and on the other hand, state independence, a plethora of means of power sufficient to protect it against foreign influences." It is necessary to determine what the "inalienable core of sovereignty" is. "This core lies juristically in the authority to determine the extent of its own sovereign rights itself, politically in the right of arms". For Treitschke, the consequence is obvious that "if the state is power, then

only the state that is truly powerful corresponds to its idea. Hence the undoubtedly ridiculous that lies in the essence of a small state... If the state is not to press like an eggshell, it can also not protect... Completely lacking in the small states is also the ability of the large state to be just".

Correlated with the concept of '*Machtstaat*' in legal theory is an emphasis on the coercive character of state and law. "Law are only those social rules that are forcibly enforced; the state is the organization that undertakes the forcible enforcement of certain rules". The decisive weakness of such an emphasis on the power and coercive character of state and law was highlighted by MAX WEBER towards the end of the German Empire, when he noted that the state can do many things, but it does not have the power to compel the free devotion of the individual to itself.

In the doctrine of state law, a saturated constitutional positivism prevailed after 1871, which combined political partisanship for the given constitution (against all approaches and postulates for its parliamentarization) with the claim to be able to ensure the solely scientific-objective treatment of state law. Political and scientific claims to power were combined in a highly consequential way. The characteristics of the given state are understood as essential features of the state as such. General considerations of what constitutes the state form a conceptual-juridical curtain, behind which highly concrete political options in favor of the existing political order were hidden. Thus, LABAND, in the Prussian budget dispute, deduces his (Bismarck-friendly) solution to the problem of the budgetless state from the concept of the law, which is "older than the constitution and precedes it".

Against such an operating conceptual jurisprudence in state law, an effective scientific opposition could hardly form. Oppositional currents remained within the spell of the pseudo-objectivity that the ruling positivism claimed.

Whoever wanted to deviate from this conceptual-juridical veiling tactic and argue more "openly" could only do so at the price of having to support the political option of the ruling opinion all the more emphatically. Thus, GEORG JELLINEK writes on the Prussian budget dispute: "As the existence of the state is given before all legal order as a factual order of the social power factors, it seeks to assert itself with inexorable necessity in the struggle with all powers hostile to it, even with the legal order, if this, in its positive design, comes into conflict with the conditions of state existence".

Otherwise, the formulas developed under the rule of the positivist doctrine of state law remain, precisely because of their generality, politically ambiguous. Formulas of the political struggle for a fully developed *Verfassungsstaat* are blunted and lose their distinctive character. If the originally pregnant constitutional-state sense of the concept of *Rechtsstaat* was already conservatively occupied and made into a concept that distinguished almost nothing anymore, the same can be established for other state-theoretical and constitutional-political basic concepts. For example, the concept of '*Volksstaat*'. The concept initially had a liberal and democratic accent; it aimed at the parliamentary representation of the *Volk*. But it is then taken up by precisely opposite political views, with the consequence that then simultaneously a strict representative of the monarchical principle like Gerber and the Eisenach Program of the SPD use the concept '*Volksstaat*' in the same way.

11. The Ideas of 1914

The spirit of German state-mindedness is invoked in appeals by German scholars at the beginning of the First World War. A specifically German concept of the state is set against Anglo-Saxon and French political understanding—the "Ideas of 1914" against the "Ideas of 1789," idealistic state-mindedness, as it characterizes the German tradition, against utilitarian commercial spirit. Even such an urbane mind as ERNST TROELTSCH opines: "The year 1914 must mean progress in freedom, but this freedom will detach itself from French and English imitations and be a German freedom, which in the first place must be a matter of disposition and lifestyle, but then also the clearly recognizable spirit of our public institutions. The Western Europeans may then say what they want about it".

This German freedom does not mean the "production of the governmental will from the summation of individual wills" and not the "control of the managers by the client," but "the free, conscious, dutiful devotion to the whole already existing through history, state, and nation".

By other authors, the spirit of German statehood and state-mindedness is celebrated even more enthusiastically: "If we can one day celebrate this war in a commemorative festival, it will be the festival of mobilization. The festival of August 2nd! The festival of inner victory! There our new spirit was born: the spirit of the strongest consolidation of all economic and all state forces into a new whole, in which all live with equal share. The new German state! The Ideas of 1914".

The "Ideas of 1914" are not merely an ephemeral expression of war enthusiasm. In them, something is articulated that was thought before and was thought again later. Exemplary is WILHELM WUNDT in 1920: "For just as the German spirit is an indispensable component of previous history, so our entire hope for a better state and moral future for humanity rests on the rebirth of that German spirit, which experienced its first ascent in the Reformation, its second in German Idealism, and will experience its third in the German state".

12. The Weimar State

The guiding principle, inherited from the dominant doctrine of state law of the 19th century, of the state as superior to the law, pre-given, and ruling with underived authority, largely shapes the opposition to the *Verfassungsstaat* (constitutional state) of the Weimar Republic. Two works of particular importance for the German doctrine of the state of this period may be cited here as examples: Rudolf Smend's 1928 study, "Constitution and Constitutional Law," and Carl Schmitt's 1932 lecture, "The Concept of the Political."

SMEND's theses are centrally directed against a main piece of modern state-theoretical thought, namely against the assumption that "the state is founded for the realization of common purposes, or... that it is at any rate justified by such purposes." His counter-thesis: "The realization of all ideal contents of meaning presupposes community, a sociality of the experience of meaning: Thus the state is also not a real being in itself, which would then be used as a means to realize purposes lying outside of it. Rather, it is only reality at all insofar as it is the realization of meaning; it is identical with this realization of meaning." The state is therefore "not to be explained or justified by a teleological relationship to purposes lying outside of it, but to be understood in its substance as the realization of value". "Realization of value," however, means

nothing other than: state action cannot be measured by purposes (such as the purpose of ensuring the most effective protection of personal freedom); rather, state action is integration as an end in itself. Smend elaborates on this for a specific area of state action that seems particularly important to him: "It is therefore an appropriate expression of the essence of every state when it connects its state and especially military symbols with symbols of victory, and Anatole France is only half right in his wit about the inclination of every army to declare itself the first in the world... The army is not only an institution or an instrument, but above all a form of life of the *Staatsvolk* (state's people)". This latter characterization—not only "institution or instrument, but above all a form of life"—applies to all state action. For: "If one regards the state as an institution in the service of its alleged purposes, the judgment about it can only be unfavorable: it fulfills them in an extremely deficient manner, like a badly constructed machine, 'it always goes with a creak and a groan'". Such a critical view of the state would no longer let it appear as a totality, as a concretization of objective laws of value, as a fullness of value—and thus it would no longer be able to integrate. "Because the state must be the master on its own ground, because the vital power drive of individuals is satisfied by participation in this ruling commonwealth, and because only in this way a part of the given context of meaning of culture becomes real at the same time - therefore the state is only real if it rules internally by right and through the actual irresistibility of its power, and if it is capable of victorious defense externally". A state that denies itself this measure is actually not a state: "A certain ultimate 'unstate-liness' of liberalism and of the parliamentarism based on it also becomes particularly apparent in the fact that it lacks such a pathos (i.e., as is peculiar to monarchy and total democracy), such a claim to value, and thus a legitimizing force peculiar to it, that it also has no need at all to strive for any corresponding legitimization".

In this lies two things: on the one hand, the accurate observation that the Weimar state lacked legitimacy. On the other hand, the inaccurate assessment that this lack was due to an "'unstate-liness' of the liberal constitutional state." In truth, the weakness of the Weimar state was based not least on the fact that such ideal conceptions of untouched state authority were held up against it precisely for the purpose of proving it to be non-existent in the proper sense. The Weimar doctrine of the state had a not insignificant share in the deficit of legitimacy produced in this way.

In retrospect, CARL SCHMITT diagnosed: "The epoch of statehood is now coming to an end." He meant: "The European part of humanity lived until recently in an epoch whose legal concepts were entirely shaped by the state and presupposed the state as the model of political unity. But now the state, as the bearer of the most astonishing of all monopolies, namely the monopoly of political decision, this showpiece of European form and occidental rationalism, is being dethroned." "The classical European state had succeeded in something quite improbable: to create peace within its interior and to exclude enmity as a legal concept... Within such a state, there was in fact only police and no longer politics". Schmitt sees the specifically political in the "distinction between friend and enemy"—the "eventuality of a struggle" is also included. "The concepts of friend, enemy, and struggle receive their real meaning from the fact that they refer and retain their reference in particular to the real possibility of physical killing". Thus, if in this view politics is not eliminated internally and replaced by police, then that means: bloodshed internally, civil war. Carl Schmitt's view of the state is dominated by Hobbes' alternative 'absolute state' or 'civil war'. The counter-model of the constitutional state with separation of powers, which shaped European constitutional development, is completely ignored, is not even worthy of mention for Schmitt. The entire constitutional-state tradition shrinks to the only pejoratively used terms "bourgeois

liberalism" or "individualistic liberalism", whereby this liberalism is accused of downright un-state-like thinking: "actually no state theory and no political idea".

Smend and Carl Schmitt stand here for those who reject and fight the *Verfassungsstaat* of the Weimar Republic. The defenders of the *Verfassungsstaat* argue against these attacks in a peculiarly powerless way. This was mainly because: The jurists who opted for '*Verfassungsstaat*' were, in their great majority, shaped by the prevailing ideal of legal positivism, which had originally been developed by Laband and Gerber precisely in the fight *against* the *Verfassungsstaat*. Thus, the Weimar Constitution is defended, at least accepted and taken seriously, by many positivist-oriented jurists as a binding enactment—but what did that help against those who wanted to replace this enactment with a new one?

With a positivist basic orientation, many defenders of the Weimar Constitution combined a value relativism (above all, an unfortunate reception of neo-Kantian value-asceticism): for reasons of scientific integrity, one had to refrain from scientifically justifying and proving value judgments—including those in favor of the *Verfassungsstaat* (Radbruch, Kelsen). This disqualified one's own advocacy for the Weimar Constitution as the expression of a rationally unjustifiable will.

13. Authoritarian or Total State?

The *Verfassungsstaat* of the Weimar Republic was considered by its opponents to be merely an expression of downright un-state-like thinking. It bears at most the pejoratively meant designation 'neutral state'—whereby this means a neutrality that is blind to its own prerequisites as a state. A state that is truly a state does not deign to have a "purpose" such as protecting the freedom of the individual, but is concerned with its powerful authority as a value in itself. This is not only the essence of the statements by Smend and Carl Schmitt, but also of many other state law teachers of the Weimar Republic.

If the "un-state," the "neutral state" of the Weimar Republic, is rejected, then ultimately only the alternative remains: "Authoritarian or Total State." This alternative is exemplarily developed in a work by HEINZ O. ZIEGLER from 1932, accentuated by a clear preference for the authoritarian model.

The formula of the total state designates an "ever more total mobilization of society for the state." State and society would be equated; this equation "necessarily leads to an ever-expanding—in principle, actually unlimitable—expansion of the state's competence and power, which at the same time means a total politicization of all social spheres of life and relations." "For the total state, there is no limit to its jurisdiction as to its power of rule. It can and must seize and order every content of social existence... The demand for the organization of a total rule over souls is... immanent" in the formula of the total state. The means of this totalization could, if the mechanism of the party state fails, also be plebiscitary dictatorship. "In this, too, the total state represents the radical possibility of democracy, it is consistent Jacobinism".

In contrast, authoritarian state thinking aims at a "radical break with the equation of state and society, i.e., with the principle of *Volkssouveränität* (popular sovereignty)". The authoritarian state is a "specifically German state conception," which, as "political conservatism and social reformism, separates state and society according to their tasks and functions". The authoritarian state "professes the unchangeable foundations of all rule and thus of all statehood: personality, independence, authority, and

self-responsibility of the government". "The opponent it encounters in this is ultimately *Volkssouveränität* and the entire plebiscitary mechanism by which it seeks to realize itself".

Yet the opposition between the total and authoritarian concepts of the state does not seem to be so great that they could not be united in political reality: "in the common rejection of party competition, of the party state, lies the possible connecting link between the plebiscitary dictatorship of the total state and the new status of the state of rule". As an example of such a combination, the fascist state is named: it represents both a total and an authoritarian state. On the one hand, "the state itself is sovereignly posited as a state of rule"—this points in the direction of the authoritarian state; on the other hand, "in the plebiscitary elements of the Duce's dictatorship, the national-democratic and totalizing tendency" shows itself.

14. The "Movement State" of National Socialism

The formula of the 'total state', with which the new statehood was to be conceptualized after the seizure of power in 1933, gives the impression that the state is being posited as absolute, elevated to an end in itself. The development of the National Socialist concept of the state shows a completely opposite course: the state is legitimized and relativized by reference to a higher purpose.

Such a relativization of the state already appears in early statements by ADOLF HITLER: "The state is a means to an end. Its purpose lies in the preservation and promotion of a community of physically and spiritually similar living beings... States that do not serve this purpose are monstrosities." From this starting point, it is even easy for Hitler to contemptuously refer to a "downright slavish veneration of so-called state authority". This relativization of state power is not just a phenomenon of the "time of struggle," the time of the fight against the Weimar Republic; it is also maintained after the seizure of power. "The starting point of the National Socialist doctrine does not lie in the state, but in the *Volk*... In recognizing the *Volk* as the permanent and the existent, we see in it the sole purpose". The superiority of the purpose over the state as a means to realize the purpose serves to fix the primacy of the National Socialist movement over the traditional state apparatus. The National Socialist movement represents, so to speak, the purpose of the state vis-à-vis the state apparatus as a means to an end. The German Reich is a "movement state," i.e., the NSDAP is the "political community that unites the *Volk* into a unified, will-capable entity and carries and shapes the Reich. Therefore, the leadership in the party is still today the original, primary position; the leadership in the Reich follows as a necessary consequence. Adolf Hitler is not the leader of the party as head of the Reich; he is, as the leader of the movement, also the leader of the Reich and the *Volk*. This ranking will also be a constitutional principle of the Reich, determined and carried by the movement, in future times". "We must not speak of 'state power,' but of 'Führer power,' if we want to correctly designate the political power in the *völkisch* Reich. For not the state as an impersonal unit is the bearer of political power, but this is given to the Führer as the executor of the *völkisch* common will".

From this standpoint, the difference between the National Socialist and Fascist understanding of the state is highlighted: "In Italy, the party does not rule the state, but it is itself considered a serving institution of the state. It is different in Germany: From a political fighting association, the NSDAP was elevated to the community that carries the *Volk* and the state"; after the assumption of the Reich Chancellorship by the Führer of the movement, a "system of personal union between party and state offices" was established.

Alongside the personal union, the "institutional connection of party and state" was established. A "fundamental law of the new constitution"—according to this analysis—is contained in Adolf Hitler's sentence: "The National Socialist movement has become the German Reich, the German state".

If one tries to interpret this sentence on the basis of the given institutional separation of state and party, a duality of two state parts must result: the old state apparatus continues to exist, mediatized by the leadership claim of the National Socialist worldview. Alongside it comes a new element of statehood—the party with its subdivisions, with a leadership claim, but without the authority to issue directives to the old state apparatus. This competentially unclear coexistence of "old" and "new" state then formed the basis for the theory of the dual state.

V. Outlook

The concept of 'state' remains one of the central concepts of constitutional policy even after 1945. The attempts to "come to terms with" the past of Nazi rule, to take responsibility for the injustice that occurred, to clarify and establish correct continuities, and to dismantle false ones, are linked with the question of whether the German state perished in 1945.

The explanation of Nazi rule as a "dual state" is taken up after 1945 in a very specific sense: by those who had served this state. It was claimed that when they performed their service, they had been in the service of the old state ("to prevent worse"), not in the service of the new (formerly new) state of injustice.

The confrontation between the will for a *Verfassungsstaat*, which led to the founding of the Federal Republic of Germany in 1949, and the communist-totalitarian will of the state can be read in the dispute over the state character of the two German states. The communist state foundation was fought with the argument that the GDR—because it lacked democratic legitimacy—was not a state. Although doubts were repeatedly expressed as to whether it was right to fixate the substantive dispute about democracy and human rights on the formal concept of 'state'; for many years, the tendency prevailed to carry out the struggle for the right constitution in the form of a struggle over the concept of the state.

While the GDR tried to comprehend its relationship with the Federal Republic of Germany with a two-state theory, the identity theory originally represented by the government of the Federal Republic was decisively modified in the course of the Eastern Treaties policy after 1969 through the recognition of the statehood of the GDR. The Federal Constitutional Court then determined the legal status of Germany in its judgment on the Basic Treaty as follows: "The German Reich continues to exist, still possesses legal capacity, but is, however, as a whole state, not capable of action for lack of organization, especially for lack of institutionalized organs... with the establishment of the Federal Republic of Germany, not a new West German state was founded, but a part of Germany was newly organized... The Federal Republic of Germany is therefore not the 'legal successor' of the German Reich, but as a state is identical with the state 'German Reich,' although 'partially identical' with regard to its spatial extent, so that in this respect the identity does not claim exclusivity". The GDR is left with only a marginal position here.

The policy of European unification was also linked to the concept of the state (statehood of a united Europe?). The difficult question of the Germans' self-understanding as a state was, at least for the area of the Federal Republic, politically-psychologically defused by the image of a state-wise united Europe.

Isolated attempts, in connection with Weimar models, to qualify the *Verfassungsstaat* of the Federal Republic of Germany as a weak state, as (in the proper sense) no longer a state, found no echo in the Federal Republic, unlike in the time of the Weimar Republic.

At the decisive junctures of the Basic Law of the Federal Republic of Germany, 'state' appears only as a composite concept; thus Art. 20 para. 1 GG characterizes the Federal Republic of Germany as a "democratic and social federal state," Art. 28 para. 1 GG speaks of the "principles of the republican, democratic, and social *Rechtsstaat*." The explosive nature lies in the combination of the rule of law (*Rechtsstaatlichkeit*), as an unbroken continuation of the constitutional-state traditions of the 19th century, and the social statehood (*Sozialstaatlichkeit*), which, although it goes back to impulses of the social movement of the 19th century, is not determined in content by it, but as a constitutional concept that is open in a special way, merely represents a comprehensive authorization of the legislator for the social reshaping of society. For the first time in a German constitution, the political parties are mentioned, in Art. 21 GG; the formulation used there, that "the parties participate in the political will-formation of the *Volk*," however, hardly gives an inkling of the extent of today's party state.

The GDR constitution of 1949 was still cloaked in the garb of liberal constitutional tradition. It was a paper constitution that in no way expressed the overriding fundamental decision for a sole rule of the Socialist Unity Party. Only the constitution of 1968 defines the GDR as a "socialist state of the German nation, as the political organization of the working people in town and country, who together under the leadership of the working class and its Marxist-Leninist party... realize socialism". Despite all adoption of Marxist positions, the Marx/Engels theory of the withering away of the state was not mentioned in the constitution of the GDR; nor in the (only) official commentary on the 1968 constitution.

40 years after the founding of the GDR, in October 1989, the totalitarian equation of state and party is broken up by a large constitutional-democratic movement. This revolution pushes for a separation of powers, for an effective guarantee of liberal rights of freedom, for democratic self-determination of the *Volk* in truly free elections. In it, the undiminished power of the fundamental concept of the *Verfassungsstaat* is shown. It is the idea of the *Verfassungsstaat* that leads to a new founding of the state unity of Germany.

GÖRG HAVERKATE

Literature

ERNST WOLFGANG BÖCKENFÖRDE, *Entstehung und Wandel des Rechtsstaatsbegriffs*, in: ders., *Staat, Gesellschaft Freiheit* (Frankfurt 1976); SUSANNE HAUSER, *Untersuchungen zum semantischen Feld der Staatsbegriffe von der Zeit Dantes bis zu Machiavelli* (phil. Diss. Zurich 1967); WOLFGANG MAGER, *Zur Entstehung des modernen Staatsbegriffs*, Akad. d. Wiss. u. Lit. Mainz, Abh. d. Geistes- u. soz.wiss. Kl. (1968), No. 9; ALESSANDRO PASSERIN D'ENTRÈVES, *The Notion of the State* (Oxford 1967); DIETMAR PEIL, *Untersuchungen zur Staats- und Herrschaftsmetaphorik in literarischen Zeugnissen von der Antike bis zur Gegenwart* (Munich 1983); JACK RICHON POLE, *The Politics of the Word 'State and its Relation to American Sovereignty*, in: *Parliaments, Estates and Representation* 8/1 (1988); STEPHAN SKALWEIT, *Der,,moderne Staat". Ein historischer Begriff und seine Problematik* (Opladen 1975); BARBARA STOLLBERG-RILINGER, *Der Staat als Maschine. Zur politischen*

Metaphorik des absoluten Fürstenstaates (Berlin 1986); PAUL-LUDWIG WEINACHT, *Staat. Studien zur Bedeutungsgeschichte des Wortes von den Anfängen bis ins 19. Jahrhundert* (Berlin 1968); CONRAD MAX V. UNRUH, *Zur Biologie der Sozialwirtschaft. Grundlinien für den inneren Aufbau des sozialen Staates* (Leipzig 1914).

VI. Introduction: 'Sovereignty' up to the 18th Century

'Sovereignty' belongs to those central concepts that are particularly involved in the political formation, theoretical design, and legal comprehension of the modern European states and are therefore also historically laden in their respective actuality. The modern concept of the state and 'sovereignty' are so closely linked that 'sovereignty' in today's imagination often appears as the very criterion for the statehood of historical forms of rule as well. From these peculiarities arise numerous difficulties that a conceptual history of the keyword faces, and which, paradoxically, are not mitigated by the fact that the origin of the modern concept of sovereignty can be personified: Despite all controversies in the barely manageable literature on the history and content of the concept of sovereignty, it is generally recognized that Jean Bodin decisively shaped the concept. The connection with the modern concept of the state and the conceptual coinage by Bodin raise the question of whether 'sovereignty' was discussed in substance—albeit in Latin terminology—already in the Middle Ages.

The problem of the relationship between ideas, concept, and word history also arises insofar as these, especially in Germany, clearly diverge even in the period after Bodin, so that until the final reception of the word 'sovereignty' towards the end of the 18th century, the conceptual development in Germany takes place primarily in other Latin and German terms (among others, '*summum imperium*', '*summa potestas*', '*maiestas*', 'Majestät', 'höchste Gewalt' [highest power]). Precisely through the German theories of sovereignty in the 17th and 18th centuries, it also becomes apparent that the concept of sovereignty and political-legal practice are in a constant state of tension, which can lead to conceptual adaptations, fictions, inconsistencies, or to the avoidance of the concept of sovereignty altogether: The relationship between the Emperor and the Imperial *Stände* and the meaning of territorial lordship resisted being captured by the concept of sovereignty.

VII. The Problem of the Concept of Sovereignty before Bodin

1. On the History of the Word

Etymologically, the keywords are rooted in the Latin preposition '*super*' ("above", "over") and the adjective '*superus*' ("located above"). From them arises in the Middle Ages the adjective '*superanus*', unknown to classical Latin, with the same meaning, which is still distinguished from the superlative '*supremus*' ("the highest", "supreme"). From '*superanus*', Old French usage forms the adjective *soverain* (*sovrain*, *sofrain*, *sobrain*, etc.) as well as the noun *soveraineté* (*sovrainetez*), whereby the original sense is increasingly overlaid by the superlative meaning.

The first attestations in the Western European languages date from the 12th century, while 'Souveränität' and 'souverän' appear in German texts only in the 17th century. The Oxford Psalter (1120) designates with the noun the highest height, the peak of the mountains: *es sovrainetez des monz*, and the adjective in the

"*Roman de Thèbes*" (around 1150) also expresses spatial height in the sense of "towering": *La tour est haute et souveraigne*.

In a figurative sense, *ses souverainetez* can be the "highest things," which originated *en souveraineté*, namely in the heights of heaven. Accordingly, the ancient gods are *les Deus soverains*, the high priest is *le prestre soverain*, and God is referred to until modern times as *le soverain pereto*, *nostre souv'rain Seigneur*; the Monarchomachs relativize the position of the king in this way: "God has *souveraine puissance sur tous Rois*" (sovereign power over all kings), for a king he is the *Roy souverain* (sovereign King).

2. '*Souverain*' and '*souveraineté*' in French Usage

Since the 13th century, the noun and adjective have also been used to characterize positions of rule. Thus, PHILIPPE DE BEAUMANOIR (1280/83) calls the king *souverain*, whose top position in the kingdom is *souverainetés*. Decisive, however, is that not only the king, but also superiors of the Beguines, the archbishop, or generally the master are designated as *souverain* or *souereign*. Although the term is also applied to the king; since he is not the universally competent holder of all governmental power, but shares it both with other members of the feudal pyramid and with the Church, the quality of '*souverain*' is not exclusively his.

The particularity of '*souverain*', rooted in the plurality of high medieval rule, is clearly reflected in BEAUMANOIR: "*Pour ce que nous parlons en cest livre en pluseurs lieus du souverain et de ce qu'il puet et doit fere, li aucun pourroient entendre pour ce que nous ne nommons conte ne duc, que ce fust du roi; mes en tous les lieus la ou li rois n'est pas nommés, nous entendons de ceus qui tienent en baronie, car chascuns barons est souverains en sa baronie. Voirs est que li rois est souverains par dessus tous et a de son droit la general garde de tout son roiaume.*" The legal records thus contain a concept of *Souveränität* determined by the feudal system. To be sure, the king, as the holder of the highest rank in the feudal hierarchy, is "*souvrains par dessus tous*" (sovereign above all); but counts, dukes, and even barons are also '*souverain*' as lords of the basic unit of sovereign rule, insofar as their spheres of competence extend. Besides particularity, relativity is therefore characteristic of this concept of *Souveränität*. Just as in the political theory of the Middle Ages '*superior*', so too is '*souverain*' used until Bodin principally as a "two-place context-dependent usage predicate," thus serving in each case to designate a relationship, while an isolated use initially yields no political sense.

In a further respect, the particularity of the concept is shown. Besides a relation, '*souveraineté*' already in the 13th century also designates a single specific competence of the king: "*pour tous les cas qui touchent le roi*" (for all cases that touch the king). "*Et pour ce qu'il est souverains par desseur tous, nous le nommons quant nous parlons d'aucune souveraineté qui a li apartient*" (And because he is sovereign over all, we name him when we speak of any sovereignty that belongs to him); therefore the sources often speak in the plural of *souverainetez*. Precisely this points to the fact that *souveraineté*—even when the term is used as an umbrella term for a general competence of the king—in each case means only a part of the royal competencies, not an abstract, comprehensive royal power, and is therefore far from the modern concept of sovereignty.

The lack of abstractness of '*souveraineté*' before Bodin corresponds to the fact that the French jurists of the 14th and 15th centuries Frenchified the concepts of rule from the Roman imperial era in the Digests and the Codex Justinianus (*majestas, imperium, auctoritas, potestas*) by translating them as *majestez, empire, autorité*, and *puissance* or *poesté*. The other literature also mostly uses different terms when the growing position of the king in France and the totality of his powers are meant, without, however, a specific guiding concept having emerged. Only under the impression of the reigns of Louis XII and Francis I do the expressions *puissance absolue* and *autorité absolue* for the rule of the king in the French language indicate an understanding of royal power that will appear in Bodin as '*souveraineté*'.

The particular, relative concept of sovereignty rooted in the feudal order is still found in the fifteenth century; even Bodin still calls the great lords of a country *seigneurs souverains* [2]. However, for ESTIENNE PASQUIER (1560/65), "*souveraine*" dukes and counts already belong to the feudal past [39]. As to the state of the concept's development—above all the absence of *souverain* as a term expressing a comprehensive royal authority—immediately before Bodin it is telling that the *Dictionaire François-Latin* published in Paris in 1549 does not include the noun and relates the adjective to the court-of-last-resort decisions of a *cour de parlement*, whereas *souveraine puissance* is indeed rendered as *imperium summum* but is also explained in the sense of judicial irreversibility

3. The Latin Middle Ages

a) The Methodological Problem. As undisputed as the modern concept of *Souveränität* is traced back to Bodin, so controversial, on the other hand, are the views on whether '*Souveränität*' and sovereign princes were discussed in the Middle Ages in the theories on the ruling power of the Pope, Emperor, and Kings. In terms of conceptual history, this comes to a head in the question of whether the sources of the Latin Middle Ages deal with '*Souveränität*' "in substance;" more closely, in view of the connection between the modern state and the concept of *Souveränität*, it can only be about pointing out the medieval prehistory of certain aspects of the modern concept of *Souveränität* and discussing the existence and limits of a specifically medieval concept of *Souveränität*. The resulting problem of the legitimacy of applying the modern concept of *Souveränität* can be solved, with Helmut G. Walther, "through the explicit introduction of a concept of *Souveränität* limited to the medieval context in the sense of *superioritas*"; this also presupposes the search for a "trans-temporal common denominator of conceptions of *Souveränität*", which can be seen in the question of the theoretical legitimation of ruler's power and its scope.

b) Princely Rule. The limits of medieval conceptions of *Souveränität* and the conceptual resistances to be overcome in the development of the modern concept of *Souveränität* are evident in two much-used Latin sentences, represented in numerous variants: *rex est imperator in regno suo* (the king is emperor in his own kingdom), and *rex superiorem in temporalibus non recognoscit* (the king recognizes no superior in temporal matters). JEAN DE BLANOT summarizes both in 1256 as follows: *nam Rex Franciae in regno suo princeps est, nam in temporalibus superiorem non recognoscit* (for the King of France is prince in his own kingdom, for in temporal matters he recognizes no superior). Quite apart from the feudal-ständisch limits, '*Souveränität*' in the Middle Ages is opposed by the concepts of rule of the Empire and the Papacy.

The *superioritas*-claim of the Emperor is formulated, for instance, by JOHANNES TEUTONICUS (1215/20): *Est autem imperator super omnes reges* (But the emperor is over all kings). Against this, INNOCENT III, in a subordinate clause of the decretal *Per venerabilem* (1202), had already developed

the concept of a French kingship independent of the Empire: *cum rex ipse superiorem in temporalibus minime recognoscat* (since the king himself recognizes no superior in temporal matters). The model of the independence of France from the Empire is taken up by the jurists of the 13th century and also applied to other kings: "Likewise every king today seems to have the same power in his land as the emperor, therefore he could do what he pleased". Of course, the imperial party, in contrast, asserts the universal rule of the emperor: *Imperator est dominus universalis* (The emperor is the universal lord); juristically, the independence of the king from the emperor is often interpreted as an exemption from the Empire, while the theory of a principled equality of kings and emperor is only slowly gaining ground.

The decretal of Innocent III also points to a further restriction of medieval conceptions of *Souveränität*, which connects to the distinction between '*temporalia*' and '*spiritualia*'. Through the emphasis on the higher rank of the '*spiritualia*', a papal claim to supremacy can be raised also with regard to worldly power: *Principibus datur potestas in terris, sacerdotibus autem potestas tribuitur et in celis. Ilis solummodo super corpora, istis etiam super animas. Unde quanto dignior est anima corpore, tanto dignius est sacerdotium quam sit regnum* (To princes is given power on earth, but to priests is given power also in heaven. To the former only over bodies, to the latter also over souls. Whence, as much as the soul is worthier than the body, so much worthier is the priesthood than the kingdom); even ROBERT BELLARMINE developed this claim in 1610 against James I of England. Medieval conceptions of *Souveränität* with regard to emperor and kings thus refer, in contrast to modern political theories, only to the temporal sphere, and even in this respect the claim to rule of the Church must be fended off. In the rejection of papal power, the non-imperial theorists are, however, in agreement with the imperial ones, JOHANN OF PARIS with MARSILIUS OF PADUA.

c) The *Volk* as Legitimation of *Ständisch* Rule. Precisely for this purpose, it is natural to understand secular power no longer as an independent position directly derived from God, but now to justify it from the *Volk* (people), thus to profane the basis of legitimation for the temporal sphere. Corresponding constructions of the Middle Ages and the 16th century have been repeatedly misinterpreted by literature as a propagation of '*Volkssouveränität*' (popular sovereignty). In fact, even with the so-called Monarchomachs in the 16th century, the *Volk* is designated as '*superior*' and '*potior*' vis-à-vis the monarch, and in French there is even talk of the *souveraineté du Peuple*. However, the French translations of the 16th century in particular make it clear how much the known feudal-*ständestaatlich* (estate-based state) ideas still play a role here. For the kings are also accorded *souveraineté*: *les Rois... reconussent que c'est du peuple, apres Dieu, qu'ils tienent toute leur souveraineté et puissance* (the Kings... recognized that it is from the people, after God, that they hold all their sovereignty and power), and alongside this, the representatives of the *Volk* are also declared to be Sovereign: *Le souverain c'est tout le peuple, ou ceus qui le representent, comme ceus que nous appellons Electeurs, Palatins, Pairs, Estats et autres* (The sovereign is the whole people, or those who represent them, such as those we call Electors, Palatines, Peers, Estates and others). The *souveraineté du Peuple* thus serves the legitimation of other bearers of rule, primarily the *Stände* as representatives of the *Volk*; only through them does the *Volk* exist legally and actually. Thus there can be no question of *Volkssouveränität* in the modern sense.

VIII. The Modern Concept of Sovereignty up to the End of the 18th Century

1. 'Sovereignty' as Princely Sovereignty

a) The Conceptual Coinage by Bodin. JEAN BODIN has a decisive influence on the development of modern conceptions of 'sovereignty'. Already at the beginning of the first book of his main work, "*Les six livres de la république*" (The Six Books of the Commonwealth) (1576), he establishes the connection between the concept of the state and 'sovereignty', which is still decisive today at least for 'external sovereignty', by defining *puissance souveraine* (sovereign power) as its most important feature. 'Sovereignty' is later defined as follows: *La souveraineté est la puissance absolue et perpetuelle d'une Republique, que les Latins appellent maiestatem* (Sovereignty is the absolute and perpetual power of a Commonwealth, which the Latins call majesty). Bodin's concept of sovereignty overcomes the limitations of state rule expressed in the previous French and Latin terminology; the *puissance publique* (public power) of the sovereign is *absolue, infinie, et par dessus les loix, les Magistrats et les particuliers* (absolute, infinite, and above the laws, the magistrates, and the particulars).

In detail, this eliminates the fixation of political rule on the temporal sphere, so that Bodin frees the sovereign both from universalist claims of the Church and from the otherwise unavoidable entanglement in confessional issues. disputes. In this respect, Bodin's doctrine already reveals itself as a reaction to the civil war in France, as an attempt to secure confessional peace and to stably rebuild the shattered order of the commonwealth by formulating the legal foundations for a powerful kingship. Accordingly, Bodin's concept of *Souveränität* is aimed against the splitting of rule among many, say, religiously, feudally, or *ständisch* legitimated bearers; all state power is concentrated in the sovereign, *la souveraineté est chose indivisible* (sovereignty is an indivisible thing); if it is divided, the prince is not sovereign. In particular, the *Stände* are therefore excluded from the political decision-making process: *tous les estats demeurent en pleine subiection du Roy, qui n'est aucunement tenu de suyvre leurs advis, ny accorder leurs requestes* (all the estates remain in full subjection to the King, who is in no way bound to follow their advice, nor to grant their requests).

The most important characteristic of *Souveränität—le point principal de la maiesté souveraine, et puissance absolue* (the main point of sovereign majesty, and absolute power)—and at the same time the decisive means of its exercise is the legislative competence. All other powers of the sovereign are ultimately contained in it, and only the generality of the concept *lois* (law) requires further characteristics of *Souveränität* to be listed. Also with regard to the legislative competence, Bodin emphasizes the independence from the consent of third parties—both outside and inside the sovereign's sphere of rule—as a sign of *Souveränität*: *La premiere marque du Prince souverain, c'est la puissance de donner loy à tous en general, et à chacun en particulier: mais ce n'est pas assez, car il faut adiouster, sans le consentement de plus grand, ni de pareil, ni de moindre que soy: car si le Prince est obligé de ne faire loy sans le consentement d'un plus grand que soy, il est vray subiect: si d'un pareil, il aura compagnon: si des subiects, soit du Senat, ou du peuple, il n'est pas souverain* (The first mark of the sovereign Prince is the power to give law to all in general, and to each in particular: but that is not enough, for one must add, without the consent of a greater, an equal, or a lesser than oneself: for if the Prince is obliged not to make law without the consent of one greater than himself, he is a true subject: if of an equal, he will have a companion: if of the subjects, be it of the Senate, or of the people, he is not sovereign). Beyond a mere further hint at the principle disempowerment of the *Stände* in princely absolutism, the role of legislation as an umbrella concept for all other competences of the sovereign conveys to Bodin's concept of *Souveränität* a rational-dynamic element, which is developed by later theorists and on which the legislative projects of the enlightened absolutism are then based; the legislative competence provides the sovereign with the power of disposal also over the existing "old" law: in general, state law and customary

law are conceivable only as founded in the authority of the sovereign. With this, however, the sovereign receives the legitimation for the conscious shaping of the order of the commonwealth.

Although Bodin considers *l'estat populaire, Aristocratique, et Royal* (the popular, aristocratic, and royal state) side by side as *républiques légitimes* (legitimate commonwealths) in which *puissance souveraine* is exercised, his concept of *Souveränität* refers mainly to the sovereign princely state. Thus, the *Prince souverain* is often spoken of even in general contexts, who is even described as *l'image de Dieu* (the image of God); furthermore, Bodin's work, in view of the civil wars in France, aims at the establishment of a strong king: *la puissance Royale est la meilleure* (the Royal power is the best). Against this background, Bodin's doctrine of the forms of state appears primarily as a consideration of the empirical historical and current findings regarding external *Souveränität*: Aristocracies and democracies are also to be recognized as sovereign states, despite all their shortcomings. Above all, however, the orientation towards princely *Souveränität* is shown by the adjective '*absolue*', with which Bodin (besides '*indivisible*') initially achieves that no other independent, internal type of rule can be conceived outside the bearer of *Souveränität*. Furthermore, he thereby continues the older formula *princeps legibus solutus* (the prince is loosed from the laws) for the understanding of princely absolutism: The sovereign prince is bound neither to the laws of his predecessors nor to his own, *le Roy ne peut estre subiect à ses loix* (the King cannot be subject to his laws): for: *il est impossible par nature de se donner loy, non plus que commander à soy-mesme chose qui depende de sa volonté* (it is impossible by nature to give oneself law, any more than to command oneself in a matter that depends on one's will).

Of course, this does not mean that no limits are set for the sovereign; rather, the sovereign prince has to observe the *loix divines et naturelles* (divine and natural laws), to keep treaties with foreign princes and the treaties he himself has concluded with his subjects, and the *leges fundamentales* (fundamental laws) are also withdrawn from his disposition. However, these limits lack guardians, since Bodin grants the *Volk* and the *Stände* no effective sanctioning powers, in particular he denies a right of resistance against sovereign princes. Nevertheless, Bodin's modifications of absolute power of the sovereign name the areas in which the disputes over the content of princely *Souveränität* will take place: on the one hand, with the mention of *leges fundamentales* and internal treaties the sovereign the question is raised of how the *Stände* (estates), with their *iura et libertates* (rights and liberties) found everywhere in Europe, can be reconciled in practice and theory with the concept of sovereignty. On the other hand, it becomes clear that it is above all *Naturrecht* (natural law) that decides on the theoretical extent of sovereign rule; Bodin also invokes it when he considers cases of a division of sovereignty between prince and *Volk* (people) to be *incompatibles avec la souveraineté absolue, et contraires aux loix et à la raison naturelle* (incompatible with absolute sovereignty, and contrary to the laws and to natural reason).

b) Thomas Hobbes. The sovereignty concept of Bodin is indeed taken up in the following period by the Royalists in France and England; however, its actual development in the sense of princely absolutism is found in the "*Leviathan*" of THOMAS HOBBES (1651). Sovereignty arises at the same time as the state; its representative "is called SOVEREIGN, and said to have Sovereign Power; and every one besides, his SUBJECT." The sovereign can be an individual or a majority of persons; although Hobbes also recognizes aristocracy and democracy as forms of state, his doctrine of sovereignty is focused on the monarchically governed state, since he, like Bodin, considers monarchy the best form of state. In other respects, too, parallels to Bodin are easy to draw: The rights of sovereignty are indivisible and untransferable; the concentration of all power in the sovereign as the only legitimate source of rule—who

as legislator is not subject to the *civill laws*—is clearly directed against the *Ständestaat* (estate-based state) and intermediate powers with their own rights.

The ultimate absolutist character of the concept of sovereignty in Hobbes is brought about by the expansion of the sphere of power through the twelve rights of sovereignty named by Hobbes and the meaninglessness of limits: "*power unlimited, is absolute sovereignty*." Thus, the sovereign cannot, for example, break the state contract and thereby forfeit his sovereignty, since he himself is not a party to this contract that transferred sovereignty to him; furthermore, the decision on the choice of means to achieve the state's purpose and the right of censorship belong to him. Accordingly, Hobbes designates as particularly dangerous for the existence of the state: "*Want of absolute power... Subjecting the sovereign power to civil laws... Attributing of absolute...propriety to subjects... Dividing of the sovereign power... Mized goverment* and *Liberty of disputing against sovereign power*." *Leges fundamentales* (fundamental laws) and *Naturrecht* (natural law) are ineffective as potential limits to the sovereign's plenitude of power, as Hobbes considers the maintenance of sovereign power itself to be the fundamental law and renders *Naturrecht* harmless through its extensive identity with positive law.

c) Lexical Literature. The turn toward absolutism, initiated by Bodin and definitively completed by Hobbes, is reflected in the lexical literature, which mostly applies the concept 'Sovereign' clearly to the absolutely ruling monarch. Thus, for example, FURETIÈRE (1690) adopts a phrase from Bodin in his definition: "*Souverain... se dit des Rois, des Princes qui n'ont personne au dessus d'eux qui leur commande, qui ne relevent que de Dieu et de leur épée*" (Sovereign... is said of Kings, of Princes who have no one above them who commands them, who are subject only to God and their sword). German lexicons emphasize the detachment of sovereign rule from its potential limits: "*Souveraineté*, the highest and unlimited ruling power, which recognizes no other power, but God, above itself. Therefore Kings are called Sovereigns, who do not hold their land as a fief (*Lehn*) from anyone, or are not bound by any *pacta conventa* (agreed pacts) to their subjects (HÜBNER 1717)." Similarly, it is stated in ZEDLER (1743) under the keyword '*Souverain*': "...free, subject to none, unrestricted, unbound, autonomous, with full power, the Highest in a Land... This predicate is especially attributed to those Kings and Princes who do not hold their lands as fiefs from anyone, or are not bound by any treaties (*Pacta Conventa*) to their subjects, and therefore, besides God, recognize no Over-Lord above them, and are thus called sovereign Lords."

The pertinent and politically sensitive question of who holds sovereignty in the German Reich is answered by a part of the French lexicons under the keyword '*souverain*': "*On appelle aussi Souverains, les Princes qui jouissent des droits regaliens, comme de faire des Lois, de battre monnoie, d'avoir droit de vie et de mort, d'ériger des Charges, de faire la paix et la guerre... quoiqu'ils relèvent d'un autre Souverain, comme les Princes d'Allemagne, qui relèvent de l'Empire*" (One also calls Sovereigns, the Princes who enjoy regal rights, such as making laws, minting coin, having the right of life and death, creating offices, making peace and war... although they are subordinate to another Sovereign, like the Princes of Germany, who are subordinate to the Empire). The German lexicons, on the other hand, leave it at that, referring the concept solely to absolutely ruling princes, so that the problems posed by the German Imperial constitution and territorial power for an application of the concept of sovereignty are bracketed out. Instead, they are discussed, for example in ZEDLER, under the keywords "*Lands-Hoheit*" (territorial lordship) and "*Majestät*" (majesty).

"*Lands-Hoheit*" (territorial lordship) and "*Majestät*" (majesty); characteristically, "*Majestät*" and not '*Souveränität*' appears as the appropriate place for discussing the forms of state: "*Majestät, Majestas*... the supreme highness and power in the State, which every Sovereign, be he a King, free Duke or Republic, possesses." '*Souverän*' in Germany thus generally refers, in the first instance, to the absolutely ruling prince.

d) The Older German *Naturrecht* of the Enlightenment. The literature oriented towards *Naturrecht* (natural law) confirms the lexical finding. Thus CHRISTIAN WOLFF (1721) distinguishes between authority with limited power, which must above all observe the "fundamental laws or *Fundamental-Gesetze* of a state," and (in monarchies and aristocracies) authority with unlimited power: "A completely unlimited power is called the highest power, or *Souveraineté*, and, whoever possesses it, a *Souverainer Herr* (sovereign lord)... over whom no one but God has command." Similarly, in 1775, HEINRICH GOTTFRIED SCHEIDEMANTEL divides supreme rule, *Majestät* (*imperium summum*)... into "the limited government and into autocracy (*souveraineté*, *imperium absolutum*)"; accordingly, he accuses John Locke of hatred against the sovereigns and characterizes Algernon Sidney as an enemy of *Souverainetät*. The concept is by no means negatively connoted for Scheidemantel: "Autocrat, *Souverain* are very fitting bynames for the absolutely ruling monarch, but monarch and tyrant are as opposed to each other as right and wrong, use and abuse."

This concept of *Souveränität*, tailored to the absolutely ruling monarch, rests essentially on the state doctrine of the older German *Naturrecht* of the 17th and 18th centuries, which, although not only knowing absolutist rule, was nevertheless concerned with its legitimation; the overwhelming rejection of Hobbes does not mean that German *Naturrecht* would have refrained from advocating for a comprehensive understanding of state rule in the *ius publicum universale* that was in the interest of the princes, using terms like '*summum imperium*', '*summa potestas*', or '*maiestas*' as Latin synonyms for '*souveraineté*'. The starting point is the consistent rejection of an institutional origin of state power directly based on God, as, for example, by NIKOLAUS HIERONYMUS GUNDLING (1734): "*Solus consensus facit ein imperium proprie sic dictum. Alles kommt ex artificio, ex pacto, ex approbatione populi, und sind diejenigen Enthusiasten, welche sagen, daß Majestas immediate a Deo komme*" (Consent alone makes an empire properly so called. Everything comes from artifice, from pact, from the approval of the people, and those are enthusiasts who say that majesty comes immediately from God). The required consent of the *Volk* does not, however, lead to a liberal model of the relationship between state, society, and individual, and certainly not to any kind of conception of *Volkssouveränität*; rather, the contract model is masterfully handled in the sense of absolutism, as, for instance, the mere obedience of the subjects is inferred from their contractual consent, and precisely from the state contract a *potestas herilis* (master's power) of the ruler can arise, which is not actually necessary for achieving the state's purpose: "*accidere potest, ut plus pacto imperanti concedatur, quam ad hunc finem requiritur, scilicet ut populus plene se eidem in servitutem dederit, ex quo respublica herilis oritur*" (it can happen that more is conceded to the ruler by pact than is required for this purpose, namely that the people have fully given themselves over to him in servitude, from which a masterly commonwealth arises). Through the state contract, the subjects lose the natural freedom of the state of nature, while the ruler, characteristically, continues to enjoy his *libertas naturalis*: "*in statu libertatis vivunt civitates et qui eas repraesentant*" (in a state of liberty live the states and those who represent them). The remaining natural freedom of the rulers thus describes their internal as well as their external *Souveränität*; since *Naturrecht* also lays down rules for the "*status libertatis*," it can be described as the specific right of the sovereign princes.

Consequently, the ruler is not bound by state law; "he has his freedom in this, insofar as they are properly civil laws." Of course, this does not mean the ruler is without limits: For HEINRICH GOTTFRIED SCHEIDEMANTEL (1770), "*Majestät* is the highest being in the state... and from this it follows: that it may obey no arbitrary laws, but only the divine commands, and those which it has accepted by contract." In other words: "Princely power has *limites naturales* and *limites pactitias*, it is bound to the limits drawn by *Naturrecht* and by *leges fundamentales*." The purpose of the state erects natural law limits; however, their effectiveness is poorly provided for: The state's purpose of '*salus publica*' or the '*Glückseligkeit*' (happiness) of the absolutist '*Policey*'-state (police state) precisely causes an expansion of the tasks of rule. Moreover, it is generally left to the ruler to determine what is appropriate for the common good; his remaining duties are not legal duties, but of a moral nature. This applies to a part of the natural law jurists even with regard to the *leges fundamentales*, so that this *Naturrecht* serves to expand the powers of the prince in his struggle against *ständisch* rights, to make him the absolutely ruling sovereign. Other authors prove to be more friendly to the *Stände*: "if a territorial lord does not rule absolutely, but has established certain contracts at the beginning of his reign with his *Stände* and subjects, he must adhere to them in all respects." But then, according to German usage, he is at that time precisely not a '*Souverain*'; in particular, a division of *Souveränität* among bearers with independent rights—thus, for instance, prince and *Stände*—is not conceivable: "To share sovereignty means to destroy it."

2. The Concept of Sovereignty in the Field of Tension between Political Theory and Legal Practice (until the mid-18th Century)

The extensive occupation of the concept of sovereignty by princely absolutism must lead to difficulties where legal and political powers exist or develop that run counter to the doctrine of sovereignty. This is the case above all in Germany (a) and in England (c). Nevertheless, the concept of sovereignty is seldom avoided as unsuitable or dangerous; rather, it leads to characteristic conceptual modifications and further developments. Only the concept of sovereignty under international law, which expresses the external independence of the state, encounters hardly any obstacles in Germany because of its neutrality towards the form of state (b).

a) '*Souveränität*' and Territorial Lordship in the German Reich. The reception of the concept of sovereignty coined by Bodin encounters linguistic and substantive difficulties in Germany. On the one hand, the German language has no adequate word at its disposal that could precisely capture the concept. Thus, for example, JOHANN OSWALDT in 1592 translates Bodin's chapter heading (*De la souveraineté*) as "Of the High Authority," and his definition of sovereignty reads in the translation: "The high authority is nothing other than a full power over the citizens and subjects, which allows itself to be bound by neither measure nor time." JOHANN SOMMER in 1615 designates princely power as the "high power, which, however, Emperors, Kings or other high authorities also possess." All the terms used miss the meaning of '*souveraineté*', as they do not just mean the sovereign authority. On the other hand, the Latin language dominates the German legal and political literature of the 17th century, so that '*Souveränität*' is treated by means of *maiestas*, *summa potestas* or *summum imperium*. Only GOTTFRIED WILHELM LEIBNIZ in 1678 uses the French word in a general sense in a Latin text, whereas German authors had hitherto applied it only specifically to French constitutional law.

However, Germanized forms of the French expressions are already found in the 17th century in the language of politics and diplomatic documents. Thus, the substantive appears—referring to the

independence of the States-General from the Spanish king—as early as 1609 as *soveranitet* and *Souveranitej*. While it is a rarity in German texts of the 17th century, the French expressions are found more frequently. It is true that, according to France's ideas for the Peace of Westphalia, the position of the princes and *Stände* in the Reich was to be regulated as follows: "*Que tous les Princes et Estats en general et en particulier seron maintenus dans tous les autres droits de Souveraineté, qui leur appartiennent*," in the Latin version: "*...in omnibus aliis suis souverenitatis juribus, ipsis competentibus*"; in the Peace of Westphalia, however, it remains with the *ius Territorii et Superioritatis* for the Imperial *Stände*, while the independence of Basel and the Swiss Cantons from the Reich is described as "*in possessione vel quasi plenae libertatis et exemptionis ab Imperio*." Primarily, the French expressions are used in the 17th century where the independence of foreign powers or the freedom of a dominion from the authority of the Reich is to be indicated: Thus the king declares in the Spanish-Dutch peace treaty of January 30, 1648, the States-General to be "*libres et Souverains Etats, Provinces et Pays*"; over Brabant, Flanders, etc., they disposed "*en tous et mêmes droits et parties de Souveraineté et Superiorité*"; and in the sources that document the development of the Duchy of Prussia towards independence between 1656 and 1660, there is frequent talk of *Suverenitas*, *Suverenus*, and *Souverenitet*, the latter also understood as a quality of the land itself. Insofar as the territorial lordship of the Imperial *Stände* is to be designated, political and legal considerations come into play that oppose an application of the concept of *Souveränität*; thus, for example, in the literary utterances of Elector MAXIMILIAN I of Bavaria, there is no talk of '*Souveränität*', but of a princely *superioritaet*.

The adoption of Bodin's doctrine of *Souveränität* in 17th-century Germany cannot, therefore, as has already become clear, take place merely in an abstract state-theoretical manner, but must deal with two concrete legal and political problems: namely, with the constitution of the German Reich and with the princely territorial lordship. It is true that Bodin's influence is shown in the fact that the (Latin-language) debate with the doctrine of *Souveränität* forms a focal point of German legal and political literature of the 17th century; in part, his definition of *Souveränität* is also adopted in its essential features. However, Bodin's classification of the German Reich as an *estat Aristocratique* is generally not accepted. The complicated, centuries-old relationship between Emperor and Imperial *Stände* cannot be grasped by Bodin's doctrine of *Souveränität*. Nevertheless, the concept of *Souveränität* is, characteristically, not declared inapplicable or completely rejected as the "guiding star of the century," but rather opinions are divided: One part of the literature declares the Emperor to be the sovereign monarch, as, for example, DIETRICH REINKINGK (1619): "*jura Majestatis resident penes Imperatorem unum et solum in imperio*" (the rights of Majesty reside with the Emperor alone and solely in the empire). Mostly, however, the consequences of applying the unchanged concept of *Souveränität*—namely, the strengthening of either the power of the Imperial *Stände* or of the Emperor—are rendered harmless by distinguishing, with individually different nuances, between *maiestas realis* and *maiestas personalis*; thus, according to JOHANNES LIMNAEUS, the former belongs to the entirety of the Imperial *Stände*, the latter to the Emperor. While the construction of the sole *Souveränität* of the Emperor contradicts the legal situation and the power relations before and after the Peace of Westphalia, the doctrine of the dual *Majestät* does take into account the dualistic peculiarities of the Imperial constitution, but it breaks Bodin's monistically conceived concept of *Souveränität*. Precisely with regard to the concept of *Souveränität*, the German Reich remains until its end in 1806 an "*irregulare aliquod corpus, et monstro simile*" (an irregular body, and similar to a monster).

Similarly controversial in the 17th and 18th centuries is the question of whether the individual Imperial *Stände*, i.e., the territorial lords, possess *Souveränität*. Terminologically, the issue is whether '*maiestas*' or '*souveraineté*' can be used for '*superioritas territorialis*' or '*Lands-Hoheit*'. In terms of content, this involves deciding on the one hand about the relationship to the Emperor, and on the other hand about the nature and scope of the powers vis-à-vis the subjects. Here, too, opinions are divided: In part, '*maiestas*' is granted only to the Emperor, in part there is talk of a *maiestas dependens* is spoken of, and partly the territorial lords are granted *vera maiestas* (true majesty). Decisive, however, is that the concept of sovereignty, until the end of the German Reich, is not applied to the Imperial estates (*Reichsstände*) without reservations because of the Emperor's position, although the literature influenced by natural law (*Naturrecht*) tends to argue for the sovereignty of the territorial lords. Thus, for example, according to ZEDLER (1737), such sovereignty of the *Stände* is, through the duty with which they are devoted to the Emperor, as it were a smaller light, made unrecognizable by a larger one, so that one can hardly attribute such independence to them otherwise than improperly or in the least part. Which is why others would much rather see them endowed with the name of high territorial authority (*hohen Landes-Obrigkeit*). Even NIKOLAUS THADDÄUS GÖNNER in 1804 speaks of the German territorial lords as semi-sovereigns (*Halbsouverains*), while Art. 4 of the 'Confederation of the Rhine Act' (1806) determines the *plénitude de la souveraineté* (fullness of sovereignty) of the member states.

Against the background of the legal and political reality of Germany in the 17th and 18th centuries, the concept of sovereignty thus acquires the character of a political target concept, whose application, because of the consequences necessarily connected with it, is partly rejected, partly affirmed for the pursuit of the corresponding ideas of independence and absolutist ambitions, without it ever being brought into complete congruence with the political and legal reality in Germany. It is true that, as JOHANN JACOB MOSER vividly writes in 1773, many territorial lords get "sovereignty-thoughts into their heads" and intend to exercise their territorial authority (*Landeshoheit*) in a sovereign, or despotic manner, supported by teachers of state and law, whom Moser designates as "master- or candle-masters of the sovereignty-makers' guild"; but this goal is opposed, with regard to external sovereignty, by the constitution of the German Reich, and with regard to internal sovereignty, often by both this and the constitution of the territories. In view of this, the replacement of '*Landeshoheit*' with the concept of sovereignty may be a play on words or a flattery—but the absolutist goals expressed therein, directed against the territorial estates (*Landstände*) and the Reich, appear to Moser at least so dangerous that he strives for counter-arguments.

b) External Sovereignty. BODIN already applies the internal structure contained in the concept of sovereignty externally and thus determines at the same time 'internal' and 'external sovereignty': *le Prince ou Duc, qui a puissance de donner loy à tous ses subiects en general, et à chacun en particulier, n'est pas souverain, s'il la reçoit d'un plus grand, ou egal à luy* (the Prince or Duke, who has the power to give law to all his subjects in general, and to each in particular, is not sovereign if he receives it from one greater, or equal to himself). In French, therefore, the quality of the prince, to be sovereign, can be imparted to the whole state, so that *souveraineté* appears virtually as a designation of the independent territory, as *estat independant, qui ne reconnoist d'autres loiz que celles de son Prince. L'Etat de Liege, de Monaco, de Dombes, sont des Souverainetés* (an independent state, which recognizes no other laws than those of its Prince. The State of Liege, of Monaco, of Dombes, are Sovereignties). In Germany, the concept of sovereignty establishes itself as a technical term for the external freedom and independence of a prince or a country in the course of the 17th century, although the possibility of its application to the individual

Imperial estates is disputed and is not established by a similar artifice as in the French lexicons. Thus the Swiss envoy in 1647 invokes the sovereignty of the Swiss Confederation (*Eidgenossenschaft*) before the Imperial Diet (*Reichstag*) and emphasizes its "free, sovereign estate," of whose "complete and unlimited sovereignty" JOHANN JACOB MOSER also speaks (1731).

Here a reason for the relatively unproblematic adoption of the aspect of the sovereignty concept that designates state independence externally becomes apparent: While internal sovereignty is always disputed, the doctrine of the forms of state behaves neutrally towards the outside, so that aristocracies, democracies, and mixed forms also enjoy external sovereignty without restrictions. It is added that natural law detaches external sovereignty from its clear connection with internal sovereignty in Bodin, by assuming that states and their representatives are in a state of natural freedom, i.e., in the state of nature—with the consequence that the natural law regulating the state of nature is directly applicable to them as the law of nations (*Völkerrecht*) or "princely law".

c) Parliamentary Sovereignty in England. Unlike in Germany, there are no linguistic obstacles in England to a reception of Bodin's concept of sovereignty; *sovereignty* corresponds in word history to the French substantive and can without further ado also adopt the semantic content of Bodin's *souveraineté*. Initially, the Royalists use it in favor of the competence claims of the King; this leads to the Parliament fundamentally rejecting it as an expression of princely sovereignty in the debates on the "Petition of Right": "*I know that prerogative is part of the law, but 'Sovereign Power' is no parliamentary word*." Around the middle of the century, the controversies over the concept of sovereignty are then primarily about the bearer of sovereignty: While Hobbes and ROBERT FILMER see the King as the Sovereign, for others the Parliament or the *Volk* is the bearer of sovereignty. At the end of the constitutional struggles, the sovereignty of the "King-in-Parliament" stands as a compromise: "*sovereign power*" is attributed to the Legislature, i.e., the Parliament; but the Legislature consists of King, House of Lords, and House of Commons: "*In all States there is an absolute Supreme Power, to which the Right of Legislation belongs; and which, by the singular Constitution of these Kingdoms, is vested in the King, Lords, and Commons*."

3. The Beginnings of the Constitutional Concept of Sovereignty in Germany

In the lexical literature of the 19th century, a change in the concept of sovereignty can be observed, insofar as it concerns internal state authority; alongside the absolutist, the constitutional concept of sovereignty has emerged. Thus CARL THEODOR WELCKER in 1843 turns against the absolutist concept of sovereignty. This is the result of a developmental process that begins in Germany in the last decades of the 18th century and is characterized above all by the reception of English and French state doctrines and by the influence of the French Revolution. The change in the concept of sovereignty is based, on the one hand, on the fact that the political theory of the 18th century in the second half of the century increasingly raises objections to absolutism, even in its enlightened form, and thereby ever more strongly emphasizes the limits of state rule; this necessarily also affects the limits of sovereignty (a). On the other hand, the concept of '*Volkssouveränität*' receives its modern content (b). Since, however, the concept of *Volkssouveränität* cannot assert itself in Germany due to the conditions there and the course of the French Revolution, and at the same time the traditional concept of sovereignty loses its appeal, views predominate in Germany around the turn of the century that either bypass the question of the bearer of sovereignty—*Volk* or Monarch—or seek a compromise (c).

a) The Limitation of Princely Sovereignty. Independent of the development of *Volkssouveränität*, the concept of sovereignty changes insofar as political theory now attempts to strengthen the, in principle co-formulated, but practically largely ineffective limits of internal sovereignty, and thus to effectively limit the power of the sovereign prince. This is done by taking seriously not only the *ständestaatlich* (estate-based state) but also the natural law bindings, and in particular by combating the claim to absoluteness of the sovereign. The role of *Naturrecht* is significant here, as it provides the liberal and democratic counter-draft to the absolutist and *ständisch* state of the *Ancien Régime*.

The view that *Naturrecht* sets limits to sovereignty is not new; what is new is the emphasis with which this is now represented. Even CHRISTIAN WOLFF (1754) grants the positive law of the sovereign a far-reaching independence from *Naturrecht*: "In the state, something can be both added to and taken away from a natural law; moreover, a civil law may permit something that is contrary to a natural commanding or prohibiting law." In contrast, the Physiocrats see precisely the "*ordre naturel*" and *Naturrecht* as the actual sovereign: The *ordre naturel*, for FRANÇOIS QUESNAY (1765), is *la règle souveraine de toute législation humaine et de toute conduite civile, politique, économique et sociale*, and MIRABEAU designates *Naturrecht* in 1774 as *la souveraine de la souveraineté ou de ceux qui la représentent* (the sovereign of sovereignty or of those who represent it). The claim of *Naturrecht* to absolute validity contained therein is also found in numerous German authors. At the same time, the contents of *Naturrecht* change: While the older *Naturrecht* of the German Enlightenment up to Wolff and his school provides the state-theoretical foundations of enlightened absolutism and for that very reason is unwilling to draw effective limits to princely sovereignty, the German *Naturrecht* in the last two decades of the 18th century contains a whole catalog of postulates of liberal political thought, which aims at an effective limitation of state rule. The state contract as a possible origin of absolute sovereignty is rendered harmless by the fact that natural freedom and human rights continue to apply unchanged in the state: "Entry into civil society does not abolish the well-understood original freedom of man." "The rights of humanity... have full validity both within and outside the state." Accordingly, the monarch lives "anything but 'in complete natural freedom'"; freedom has become an attribute of the citizen, who can, moreover, set a whole range of specific rights of freedom against the state. In parallel, the tasks of the state are reduced, and thus the scope of the sovereign's powers, by rejecting happiness as the purpose of the state. Furthermore, a part of the German *Naturrecht* takes up the idea of the separation of powers from Locke and Montesquieu, which is not compatible with absolutist princely sovereignty.

The limitation of princely sovereignty would be incomplete in theory if the doctrine of a lack of binding of the prince to positive law, and thus one of the cornerstones of absolutistically understood sovereignty, were to persist. While KARL ANTON FREIHERR VON MARTINI in 1787 still draws the conclusion from the right of supreme rule to issue, change, and abolish laws, that the regent "can also change and abolish them and is therefore not bound to them himself," *Naturrecht* now generally propagates the binding of the ruler to the positive laws. A first step towards this is the view that a "double person is to be distinguished" in the regent, "firstly that of the ruler, insofar as he exercises the rights of state government, and then that of a private person, of a fellow citizen and human being"; as a private person, however, he is "subject to the laws like any other citizen." Beyond this, the prince is also generally obliged to "obey the laws given to the *Volk* himself." "The ruler is taken from the midst of his fellow citizens, and remains a citizen afterwards."

With these and other maxims issued as binding, state rule is, of course, so strongly limited that an absolutistically governed princely state is no longer conceivable. The subject of sovereignty is newly determined.

b) '*Volkssouveränität*'. As a new bearer of sovereignty, existing also outside the democratic form of state (in the older sense), the *Volk* comes into consideration above all. At first glance, JOHANNES ALTHUSIUS (1603) already takes this step: "*Administratorem, procuratorem, gubernatorem jurium majestatis, principem agnosco. Proprietarium vero et usufructuarium majestatis, nullum alium, quam populum universum, in corpus unum symbioticum ex pluribus minoribus consociationibus consociatum*" (I acknowledge the administrator, procurator, governor of the rights of majesty, the prince. But I acknowledge no other proprietor and usufructuary of majesty than the entire people, associated into one symbiotic body from a plurality of smaller associations). On closer inspection, this contains the rejection of Bodin's concept of sovereignty, but not the theory of a "sovereignty of the *Volk*" in the sense of a free community of will of equal citizens. Rather, Althusius, starting from the corporative-*ständisch* structured *Volk*, consistently opposes Bodin's princely sovereignty with a *ständestaatlich* dualism. The *majestas populi* serves, similar to the French Monarchomachs, the legitimation of the divided rule between king and *Stände*; the *Volk* is mediated through the *Stände*. This applies essentially also to all doctrines that distinguish between a *maiestas realis* (of the *Volk* or the assembly of the *Stände*, e.g., of the *Reichstag*) and a *maiestas personalis* (of the prince, e.g., of the Emperor).

Fundamentally, it does not stand in the way of the possibility of absolute princely sovereignty until the end of the 18th century that the original sovereignty is conceded to the *Volk*, for this usually ends with the state contract: *du moment qu'un Peuple s'est soumis..., à un Roi véritablement tel, il n'a plus le Pouvoir Souverain* (from the moment a People has submitted... to a King truly as such, it no longer has the Sovereign Power). The fundamental power, even for AUGUST LUDWIG SCHLÖZER (1793), is originally with the *Volk*: "but it has transferred it once; it had to transfer it, because as a *Volk* it is incapable of exercising it itself; and it may not take it back at will, even if it could." A sovereign power residing in the *Volk* thus continues to exist only in the democratic form of state, without a positive valuation necessarily being associated with this concept.

However, the original power of the *Volk* now serves not in every case merely the justification of *ständisch* elements of rule or the legitimation of rule in general. Rather, a new control instance can arise from it, which monitors whether the prince uses his sovereignty in accordance with the purpose of the state. Thus, according to BARBEYRAC, the *Volk* reserves the right, at least tacitly, to reverse the transfer of sovereignty, "*lors que celui à qui on a conféré le Pouvoir en abuse d'une manière directement et notablement contraire à la fin pour laquelle il lui a été conféré*" (when he to whom Power has been conferred abuses it in a manner directly and notably contrary to the end for which it was conferred upon him). Beyond this *droit de le reprendre* (right to take it back), the idea of a permanent *Sovereign Power* of the *Volk* has been known in England since the middle of the 17th century. JOHN LOCKE (1690) indeed describes the Legislative—in England consisting of King, House of Lords, and House of Commons—as *supreme power*, but: "*the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them*." However, this "*supreme power*" of the *Volk* only becomes effective when a case of the *Dissolution of Government* occurs. Similarly, JOHANN HEINRICH GOTTLOB VON JUSTI (1760) also knows the "active supreme power, which is introduced by the fundamental

constitutions of the state," and the "fundamental power of the entire *Volk*, from which the former arises, and which remains dormant as long as the question is not of the fundamental constitutions, or until the state is in the utmost danger of collapse."

It is JEAN JACQUES ROUSSEAU who, in his "*Contrat social*" (1762), develops the concept of a *Volkssouveränität* that not only has a rule-legitimizing function or only intervenes in certain exceptional situations, but is permanently exercised in the state via the *volonté générale*—the laws are nothing other than "*des actes de la volonté générale*" (acts of the general will): "*la souveraineté n'étant que l'exercice de la volonté générale ne peut jamais s'aliéner et... le souverain, qui n'est qu'un être collectif, ne peut être représenté que par lui-même*" (sovereignty, being but the exercise of the general will, can never be alienated... and the sovereign, who is but a collective being, can only be represented by himself). Rousseau formulates the antithesis to the sovereignty of princes and *Stände* as well as to dualistic concepts of sovereignty, since sovereignty is *inaliénable* and *indivisible* and is based on the political and legal equality of all men acquired through the state contract. The concept of sovereignty excludes any form of representation and therefore refers exclusively to the *Volk*: "*à l'instant qu'il y a un maitre, il n'y a plus de Souverain*" (the instant there is a master, there is no longer a Sovereign).

As a slogan of intoxicating effect, '*Volkssouveränität*' finds its place in the constitutional documents of the American and French Revolutions: "*Le principe de toute souveraineté réside essentiellement dans la Nation; nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément*" (The principle of all sovereignty resides essentially in the Nation; no body, no individual can exercise any authority which does not expressly emanate from it). Of course, Rousseau's polemical and radical counter-draft against the sovereignty of princes and *Stände* is modified in two main ways: On the one hand, *Volkssouveränität* is now realized through representation; on the other hand, the scope of competence of the represented *Volk* is limited, unlike with Rousseau where—"*la volonté générale est toujours droite*" (the general will is always right).

c) Aporias of the Concept of Sovereignty in Germany. The term '*Volkssouveränität*' also finds its way into the German language. Thus, for example, the Mainz Jacobin GEORG WEDEKIND in 1792 describes freedom as a consequence of the sovereignty of the *Volk*. For JOHANN ADAM BERGK (1796), sovereignty consists in the general will, "and no *Volk* has the right to alienate the exercise thereof." On the other hand, *Volkssouveränität*, just like the French Revolution, is often rejected as politically dangerous: JOHANN AUGUST EBERHARD turns in 1793 against the results of the "dangerous delusion... that a *Volk* could retain its sovereignty and exercise it itself," and repeatedly and explicitly rejects Rousseau's theory of the contractual alienation of *Volkssouveränität* to the monarch. Just like the possibility and desirability of *Volkssouveränität* currently exercised in the state, the legal concept and the political target concept are therefore controversial in Germany. In addition, the specific constitutional conditions of the German Reich stand in the way of a problem-free application of the concept of sovereignty to the territorial lords or to the Emperor. At the same time, *Naturrecht* in particular destroys the traditional concept of sovereignty, in that princely sovereignty, as shown, is limited to the point of contradiction and in extreme cases is abolished by norms of *Naturrecht*. The dilemma of *Naturrecht*, standing between prince- and *Volkssouveränität*, is clearly shown by KARL HEINRICH HEYDENREICH (1795): "The supreme ruler has executive sovereignty, even if he is under the fundamental laws of the state in every form of government; but since these express purely resolutions of the general will, the general will remains, notwithstanding the submission (!), the absolute (!) Sovereign."

It is therefore not surprising that most authors towards the end of the 18th century try to develop solutions outside of these two political directions. Thus, for example, the individual man, according to JOHANN GOTTLIEB FICHTE, receives through the citizen-state contract "the rights of sovereignty, so that he, with regard to his public character... is a participant in the sovereignty, and what concerns his private character, is only a free individual".

Besides the defusing of the concept of sovereignty through reference to the individual citizen, a new, *rechtsstaatlich*-constitutionally oriented concept of sovereignty is emerging, which shows itself in the fact that the ruler is now bound without restrictions to positive law and the fundamental laws of the state, and the positive laws given in accordance with *Naturrecht* appear as the actual sovereign: "The only true philosophical answer to the question of the right of sovereignty," JAKOB FRIEDRICH FRIES (1803) sees in the fact that "reason alone... according to the idea... (should) give the law." "The majesty of a state is the justice, omnipotence, and holiness of its laws. Majesty is an idea...; it rests neither on millions nor on one... It was a... folly and foolishness of past centuries, for citizens themselves... and were they even whole nations, to be held as majesties: only their right has majesty." The sovereignty of right and law as a way out ends, however, at the latest when the construction of a universally binding *Naturrecht* collapses, over the question of the legislator, again at the decision between *Volk* or prince as the bearer of sovereignty. With this, one of the problems is outlined, the attempts to solve which determine the development of the concept of sovereignty in the 19th century.

DIETHELM KLIPPEL

Literature

JÜRGEN DENNERT, *Ursprung und Begriff der Souveränität* (Stuttgart 1964); ADOLF DOCK, *Der Souveränetätsbegriff von Bodin bis zu Friedrich dem Großen* (Strasbourg 1897); GERHARD HENKEL, *Untersuchungen zur Rezeption des Souveränitätsbegriffs durch die deutsche Staatstheorie in der ersten Hälfte des 17. Jahrhunderts* (jur. Diss. Marburg 1967); FRANCIS HARRIS HINSLEY, *Sovereignty* (London 1966); ULRIKE KRAUTHEIM, *Die Souveränitätskonzeption in den englischen Verfassungskonflikten des 17. Jahrhunderts. Eine Studie zur Rezeption der Lehre Bodins in England von der Regierungszeit Elisabeths I. bis zur Restauration der Stuartherrschaft unter Karl II.* (Frankfurt a. M., Bern, Las Vegas 1977); HELMUT QUARITSCH, *Staat und Souveränität, Bd. 1: Die Grundlagen* (Frankfurt a. M. 1970); ders., *Souveränität. Entstehung und Entwicklung des Begriffs in Frankreich und Deutschland vom 13. Jh. bis 1806* (Berlin, Munich 1986); WOLFGANG QUINT, *Souveränitätsbegriff und Souveränitätspolitik in Bayern. Von der Mitte des 17. bis zur ersten Hälfte des 19. Jahrhunderts* (Berlin 1971); RALF RITTER, *Der Wandel der Souveränitätsidee in der politischen Literatur Frankreichs von 1587 bis 1630. Eine Untersuchung zum Werdegang des absolutistischen Staatsdenkens* (phil. Diss. Freiburg i. Br. 1968); HELMUT G. WALTHER, *Imperiales Königtum, Konziliarismus und Volkssouveränität. Studien zu den Grenzen des mittelalterlichen Souveränitätsgedankens* (Munich 1976).

IX. 'Sovereignty': 19th and 20th Century

Even in the 19th century, 'sovereignty' is a concept that dominates the doctrine of the state and the understanding of the state. Its application, however, continues to encounter and increasingly runs into difficulties. This is due, on the one hand, to the establishment of the *Verfassungsstaat* and the associated ideas of separation of powers. Both stand in the tradition of the '*mixed government*', which Jean Bodin and Thomas Hobbes had opposed with the classic conception of 'sovereignty'. On the other hand, it is due to the increasing integration of states into consolidating federal orders and into an international system regulated by supranational organizations—phenomena that were foreign to the classical understanding of sovereignty, which knew neither composite states nor ordering powers above the sovereign state. Attempts to hold on to the idea of sovereignty despite this development lead to assumptions of a transferability, divisibility, or limitation of sovereignty, which contradict the original conceptual conception. Also striking is the increasing uncertainty in the determination of its 'bearer'. As such, besides the monarch or the *Volk*, now also the state, reason, the law, conscience, public opinion, etc., can appear. Accordingly, sovereignty-composita like '*Volkssouveränität*', '*Fürstensouveränität*' (princely sovereignty), or '*Staatssouveränität*' (state sovereignty) now acquire a special significance. They become guiding concepts, which the following presentation will address.

1. '*Volkssouveränität*' versus '*Fürstensouveränität*'

a) '*Volkssouveränität*' and Criticism of '*Volkssouveränität*'. 'Sovereignty' has been naturalized in Germany since the 18th century, even though its French origin is repeatedly emphasized. At the center of the discussion, however, is not the classic, monarchical-absolutist version of the concept—which hardly finds mention even in the mid-19th century—but the idea of *Volkssouveränität*, especially since the French and American Revolutions with their constitution-making emanating from the *Volk*. By '*Volkssouveränität*', the exercise of sovereignty rights by the *Volk* itself is not understood; rather, ideas of transfer, control, and reversion of sovereign power are associated with it. Against this view, which can be traced back to the 16th century, ROUSSEAU turns in the mid-18th century with his reclamation of the inalienability and indivisibility of sovereignty.

At the latest since this time, '*Volkssouveränität*' is an ambiguous concept. This becomes clear in the French constitution of 1791, where it is stated almost in the same breath: "*La souveraineté est une, indivisible, inaliénable et imprescriptible; elle appartient à la Nation; aucune section du peuple ni aucun individu ne peut s'en attribuer l'exercise,*" (Sovereignty is one, indivisible, inalienable, and imprescriptible; it belongs to the Nation; no section of the people nor any individual can attribute its exercise to themselves), and: "*La Nation, de qui seule émanent tous les pouvoirs, ne peut les exercer que par délégation. La Constitution française est représentative*" (The Nation, from which alone all powers emanate, can only exercise them by delegation. The French Constitution is representative). The critique of *Volkssouveränität* is also based on the ambiguity of the concept, insofar as the idea of a sovereign *Volk* is

not rejected altogether, for instance because a *Volk* does not exist before the sovereign and the founding of state rule, or because the *Volk* has no one under it, and consequently cannot be the *supremus*. Many authors accept the expression '*Volkssouveränität*', but turn against the atomistic conception of it, against the idea of the *Volk* as an (arbitrary) multitude of sovereignly deciding individuals, and they censure the use of the concept in a demagogic sense at the time of the French Revolution. Thus it is stated by HEGEL in 1821: "*Volks-Souverainetät* can be said in the sense that a *Volk* is altogether independent externally and constitutes its own state... One can also speak of sovereignty internally in that it resides in the *Volk*, when one speaks only of the whole at all... But *Volks-Souverainetät* as the opposite of the sovereignty existing in the monarch, is the common sense in which one has begun to speak of *Volks-Souverainetät* in recent times; - in this opposition, *Volks-Souverainetät* belongs to the confused thoughts to which the crude conception of the *Volk* is based. Similarly, ARETIN expresses himself in 1823. Further formulations of this kind can be found in the common lexicons of the time up to the second half of the 19th century, and even with a conservative author like FRIEDRICH JULIUS STAHL.

The rejection of the idea of direct popular rule provides the opportunity to combine *Volkssouveränität* with the most varied forms of state, not only with democracy, but—through the construction of a contract of submission—also with monarchy, or with the representative system, as the National Assembly did in the French Revolution. Here it was above all SIEYÈS who turned against the "colossal conception of an absolutely conceived sovereignty," which stemmed from "monarchical superstition," but which also distorted the idea of *Volkssouveränität*, and who sought to mediate between *Volkssouveränität* and the separation of powers, among other things, with the distinction between '*pouvoir constituant*' (constituent power) and '*pouvoir constitué*' (constituted power).

The idea of a representative system based on *Volkssouveränität* is formulated at the beginning of the 19th century above all by BENJAMIN CONSTANT. For Constant, too, the *universalité des citoyens* (universality of the citizens) is the sovereign. In pronounced contrast to Rousseau, however, sovereignty exists for him only *d'une manière limitée et relative* (in a limited and relative manner), restricted by *justice* and *droits des individus* (rights of individuals), as well as delegated to specific bearers of power. He succeeds in decoupling *Volkssouveränität* from the directly expressed will of the *Volk* by identifying the *souveraineté du peuple* with the *suprématie de la volonté générale* (supremacy of the general will) as the not contestable principle of state exercise of power. This principle also applies to kingdoms, aristocracies, or theocracies. In a nutshell, the '*souveraineté du peuple*' thus becomes a synonym for legitimate political order in general: *En un mot, il n'existe au monde que deux pouvoirs, l'un illégitime, c'est la force; l'autre légitime, c'est la volonté générale* (In a word, there exist in the world only two powers, one illegitimate, that is force; the other legitimate, that is the general will).

In Germany, this way of thinking is propagated above all by FRIEDRICH MURHARD. For him, too, *Volkssouveränität* is a matter of course, since all governments are dependent on the recognition by the *Volk*, even despotism and military rule. But one must concede that the "ambiguous word *Volkssouverainität* occasionally led to the unfortunate idea of a downright necessary opposition between regents and *Volk* and a subordination of the latter over the former, and thus consequently to an approval of any successful rebellion." This, however, is "not necessary...: for the correctly understood concept of *Volkssouverainität* is based on the in itself true idea that the entirety of the *Volk*, the epitome of rulers and ruled—not thus the one of both alone with exclusion of the other—and thus the will of the *Volk* is to be regarded as the ultimate source of the highest or the governmental power." By also basing the idea of

Volkssouveränität on the general will, the *Volk* for him becomes merely the "source of all power" and *Volkssouveränität* merely a "touchstone of state authority," compatible also with the hereditary monarchy. However, Murhard emphasizes that the *Volk* as the "source of state power" can never be completely excluded from it. He clearly bases this on the older, English considerations of the concept of sovereignty.

b) Sovereignty of the Nation. Even more strongly, the idea of the limitedness and non-immediacy of popular rule is expressed in the formula of *souveraineté nationale*. In contrast to the '*souveraineté du peuple*', which always evokes associations with the rule of a multitude of individuals, of the crowd, the concept '*Souveränität der Nation*' from the outset involves the idea of a unity that stands above the individual and encompasses him. For SISMONDI, the concept '*nation*', in contrast to the egalitarian '*souveraineté du peuple*', expresses the unity of "those who command and those who obey," whereas one usually distinguishes *peuple* from *gouvernement*. Therefore, the dogma of the *souveraineté du peuple* is "*en partie vrai, en partie faux*" (partly true, partly false)—the represented above the representatives, the electors above the elected, and the popular masses, often even the insurrections, above the governments—but this is only acceptable when there is a unanimous will among the people. If this does not exist, as is usually the case, representation is needed to bring it forth. Sismondi finds the possibility for this in the *raison nationale* (national reason), which he plays against the will of the individuals: "*La souveraineté nationale appartient à la raison nationale, à cette raison éclairée par toutes les lumières, animée par toutes les vertus qui se trouvent dans la nation*" (National sovereignty belongs to the national reason, to that reason enlightened by all the lights, animated by all the virtues that are found in the nation). Unmistakably, in the so-characterized national reason, the idea of a patriotically emphasized difference between peoples resonates. Although more individualistic versions of *Volkssouveränität* continue to be advocated, the idea of national sovereignty remains decisive for French state doctrine. In this, 'state' and 'nation' are often identified with each other.

In Germany, there is more frequent talk of the '*Souveränität der Nation*' (sovereignty of the nation) in the period of 1848. Thus HEINRICH VON GAGERN justifies the right of the National Assembly to create a constitution in his opening speech in the Paulskirche with the fact that the "calling and the authority... for this lay in the sovereignty of the nation." Also in Germany, the term, used in various ways, indicates a mitigation of the idea of *Volkssouveränität* and is therefore favored by the moderate, the 'constitutionalists', in the revolutionary period. The Left, on the other hand, demands *Volkssouveränität* in its full scope, by which they understand, among other things, the establishment of the Reich constitution exclusively by the National Assembly and legislation in the future solely through a popular representation.

As is well known, the Frankfurt National Assembly's '*Souveränitätsdünkel*' ("sovereignty arrogance," as King Maximilian II called it) was denied success. The idea of *Volkssouveränität* first experienced its political breakthrough in Germany in 1918. Since then, it has been said here: "State power emanates from the *Volk*."

c) Excursus: Parliamentary Sovereignty. The general trend of democratization in the 19th and 20th centuries is also reflected in the reflections on the 'sovereignty of Parliament' in England. The original meaning of the expression 'sovereignty of the King in Parliament' is retained here and, through Dicey's "*Lectures Introductory to the Study of the Law of Constitution*," becomes a "commonplace of English Constitutional Law." The view, already held by Blackstone and later by Austin, that the sovereign power

of Parliament consists in an unlimited right to legislate, is also strengthened, which DICEY, referring to De Lolme, drastically formulates as follows: "*It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman*." Yet, over time, the accents shift noticeably. Under the impression of the political development since the Reform Bill of 1832, the voices multiply that consider the House of Commons the "*real sovereign of the state*" or claim of it that it is the "*true sovereign*." The further development, which leads to the formation of large party organizations and to the increased dependence of the House of Commons on the electorate, is taken into account by Dicey, in that he contrasts the traditional *Parliamentary sovereignty* with the electorate as the "*political sovereign of the state*" that comes to the fore upon the dissolution of the House of Commons.

d) Princely Sovereignty (*Fürstensouveränität*). Although the idea of *Volkssouveränität* gradually asserts itself, it should not be overlooked that at the beginning of the 19th century the situation is still completely different. It is entirely under the sign of the revival of monarchical sovereignty, especially in Germany. This is connected with the dissolution of the old Reich, through which its territories attain the *plénitude de la souveraineté* (fullness of sovereignty). Notwithstanding their integration into the Confederation of the Rhine and later into the German Confederation, the *Länder* (states) are now considered sovereign states both "externally" and "internally." Their internal sovereignty, however, is naturally understood as monarchical. Thus it is stated by GÖNNER: "The regents rule their newly sovereign *Länder* in their entirety and without distinction with complete sovereignty; the form of government of these new states is purely monarchical... the present ruler is a sovereign monarch and free from all fetters of the imperial association."

The constitutions of the second constitutional wave in the Restoration era are also filled with the idea of monarchical sovereignty, above all the French *Charte* of 1814, according to whose preamble "*l'autorité tout entière résidât en France dans la personne du Roi*" (the entire authority in France resided in the person of the King). It is followed by the early German constitutions. The classic formulation is found in Art. 57 of the Vienna Final Act of the German Confederation of 1820: "Since the German Confederation, with the exception of the free cities, consists of sovereign princes, it must, according to the fundamental concept thereby given, be that the entire state power remains united in the head of the State, and the sovereign can only be bound in the exercise of certain rights to the cooperation of the *Stände* by a territorial constitution."

It is, however, difficult to theoretically justify the restored *Fürstensouveränität*. For this purpose, one resorts to older modes of legitimation such as the contract theory, the divine right of kings (*Gottesgnadentum*), and the patrimonial justification of rule. The contract-theoretical justification can connect with the conception of the contract of submission developed by Hobbes, although its radical consequences—mindful of the constitutional limitation of monarchical power—are no longer drawn. In general, the contract theory appears, in view of the fact that the representatives of *Volkssouveränität* use it with success, as less and less suitable to support the princely position. Thus HALLER says: "According to that system, the highest power or at least the source of power is in the *Volk*, i.e., in the totality of all subjects, because they are said to have founded the state by their coming together. They are the true sovereign, the actual ruler, the *summus imperans*, in them alone is the majesty. The princes, however, who were formerly held to be independent lords, are transformed into mere servants or officials of their *Volk*, for the authorized person must necessarily be subordinate to the authorizer."

Therefore, the derivation of monarchical power from God is preferred by the legitimists around the turn of the century—a mode of justification that stands in the tradition of the divine right of kings of the European monarchy and its legitimation from divine law, as it was especially cultivated by absolutism. By the French traditionalists like de Bonald, the *souveraineté de Dieu* (sovereignty of God) is posited as an answer to the "satanic revolution," not simply opposing princely sovereignty to *Volkssouveränität*, but the *souveraineté de Dieu* (sovereignty of God). It is the true source of human society, in contrast to the *souveraineté de l'homme ou du peuple* (sovereignty of man or of the people), the insistence on the self-empowerment of human reason, in the "*propagation de l'athéisme*" (propagation of atheism) ends: "*l'athéisme place le pouvoir suprême sur les hommes dans les hommes mêmes*" (atheism places the supreme power on men within men themselves). State and princes, even if they are elected by the *Volk*, come from God, emphasizes DE MAISTRE; thus the holy scriptures taught from the first kings. It is true that monarchy is not the only form of rule originating from God, but in it the indispensable unity of the state's decision-making is most clearly expressed. "*Le gouvernement monarchique est si naturel, que les hommes l'identifient sans s'en apercevoir avec la souveraineté*" (Monarchical government is so natural that men identify it with sovereignty without realizing it). As the representative of the divine will, the sovereign is for de Maistre the *image de Dieu* (image of God), and thus Bodin had already described the prince, but in this way the sovereignty of the *Volk* (as the true voice of God) can also easily be justified. A little later, the socialist LEROUX teaches: "*La souveraineté est la puissance qui de Dieu descend dans l'esprit humain et se manifeste par le peuple: c'est à dire par l'unité indivisible de tous les citoyens, véritable image de Celui dont elle découle*" (Sovereignty is the power that descends from God into the human spirit and manifests itself through the people: that is to say, by the indivisible unity of all citizens, a true image of Him from whom it flows).

Princes and sovereignty are more closely connected in the patrimonial theory, by which the traditional positions of rule and property are presented as the natural and to-be-preserved order of God. For this theory, the prince is simply a "propertied, powerful, and therefore independent man," whose "independence is precisely the much-discussed sovereignty"—a private right, which may have been acquired by one's own effort, by donation, or by the cessation of a higher power. It is true that the patrimonial theory has a sharp eye for the real conditions of sovereignty, namely "money,... soldiers,... intellect, courage, etc.," but a sweeping success was not granted to it either. In 1832, after the fall of the Restoration monarchy in France, LERMINIER, in his "*Philosophie de droit*," asserts curtly against the monarchical legitimism: "*La souveraineté, mélange de raison, de justice et de volonté qui représente à la fois ce qu'une nation croit, pense et veut, est dans le peuple et pas ailleurs*" (Sovereignty, a mixture of reason, justice, and will, which represents at the same time what a nation believes, thinks, and wants, is in the people and nowhere else).

In Germany, the idea of the state as a divine institution and of princely rule from divine providence is still presented for a long time by FRIEDRICH JULIUS STAHL, but his explanations are already visibly under the impression of the declining importance of the monarchy. It is true that for Stahl, the king is still self-evidently sovereign, "that is his concept, and a king who is not sovereign is an absurdity," but he must concede that this is also said of the King of England, who, opposite his parliament which possesses co-sovereignty, has only a veto position. Stahl therefore distinguishes, in order to secure a leading position for the German monarch in the constitution, between sovereignty and the monarchical principle. 'Sovereignty' thereby becomes a formal legal concept, which merely designates the highest position in the state, but no longer the decisive or even absolute power.

This interpretation is not far from the merely titular designation of reigning princes as 'sovereigns' that had already become common at that time. The devaluation of the concept of sovereignty shown therein is not only connected in Germany with the general decline of the monarchical idea in the *Verfassungsstaat*, but also with the existence of many small and smallest 'sovereigns' since 1806, who were already accused of "sovereignty swindle" in 1816 and whose "sovereignty mania" the Göttingen state law scholar HEINRICH ALBERT ZACHARIÄ scourged half a century later, pointing out that the "divine right of authority was a completely unknown quantity" and that there was "no original or in the person of the prince rooted sovereignty." It is evident that around the middle of the 19th century, the time of *Fürstensouveränität* is over, even if the monarchs in Germany continue to exist as bearers of state power until 1918.

2. Sovereignty in the *Verfassungsstaat*

a) On the Problematics of Constitutional Sovereignty. '*Fürstensouveränität*' and '*Volkssouveränität*' are at the beginning of the 19th century not simply designations for different kinds of supreme power in states, but opposing set battle concepts. They symbolize different political power claims. Both have something in common in that they know only a single bearer of sovereign power. Through this, they come into conflict with the reality of the *Verfassungsstaat* (constitutional state), which is determined by the idea of separation of powers instead of the concentration of powers. This leads some authors to declare sovereignty in states with a mixed constitution as divided, which usually means 'participation' in the exercise of the highest state power. The leaning on the English model of the 'King in Parliament' with the joint exercise of rule by Monarch, House of Lords (Aristocracy), and House of Commons (*Volk*) is quite unmistakable.

Ideas of this kind, however, encounter the difficulty in Germany that the constitutional states here are constructed according to the 'monarchical principle,' the prince in them being considered the sole holder and the only source of state power. Contemporary literature accounts for this clear attribution of sovereignty by speaking not of a divided but of a limited sovereignty. Thus, for JOSEF HELD, it lies almost in the essence of constitutionalism that in it sovereignty is limited by the constitution or by recognized custom. However, in constitutional states, it is not just about an integration of sovereign power in a substantive sense, but above all about its limitation through co-determination, for instance by the popular representation in legislation. The assertion that this too represents only a limitation and not a division of the exercise of sovereign power, that the territorial estates (*Landstände*) were indeed co-legislating, ... but ... not co-governing, not co-administering, implies a not insignificant reinterpretation of the concept of sovereignty. On the one hand, sovereignty under these circumstances can only be understood as the highest, but not as the sole (total) state decision-making power. On the other hand, with this approach, it can only be negatively determined; for a monarch who no longer makes legislative decisions alone is ultimately reduced to a veto position; his sovereignty then lies in the fact that nothing can be decided without him, nothing against him.

Besides 'limitation', the old distinction between 'possession' and 'exercise' of a right has also served to mediate the idea of sovereignty with that of the separation of powers in the *Verfassungsstaat*, especially when one tries to construct this state from the perspective of *Volkssouveränität*. But even when the possession of sovereignty is attributed to a prince, a distinction is made between it and the exercise, which can be bound to certain requirements such as acts of consent and countersignature. The distinction then

serves, for example, to establish a presumption in doubtful cases for the sole exercise of competence by the holder of sovereignty.

This distinction, however, only becomes truly significant when the holder of sovereignty is also able to act as such at some point, and not always only as a co-exerciser of certain limited competences. This is not the case in the *Verfassungsstaat* in its normal state, but possibly in a state of exception, upon the occurrence of a state of emergency, in which normal state activity fails. This extreme situation, also possible in the *Verfassungsstaat*, led CARL SCHMITT in 1922 to his famous dictum: 'Sovereign is he who decides on the state of exception.' That the sovereign, limited in the normal case, returns to full function in the state of exception is in itself an old view. With Schmitt, however, the state of exception is transformed from a temporary phase into a free space, in which the sovereign—as it were as *pouvoir constituant*—or, as Schmitt says in a remarkable combination of previously disparate concepts: in the form of the sovereign dictatorship, creates new normality. The state of exception here no longer serves normality, but is superior to it as its primordial ground. The sovereign advances to the quasi-divine, omnipotent creator of all right, and 'sovereignty' is accordingly understood as a "secularized theological concept." Despite all ascertainable historical connections between 'secular sovereignty' and papal '*plenitudo potestatis*' (plenitude of power) and infallibility, it remains questionable to what extent the classic conception of 'sovereignty' is accurately characterized thereby. For Bodin, 'sovereignty' is 'perpetual' and permanently present in legislation, not a dictatorial exceptional power. Its concept is not an existentialist "borderline concept" like Carl Schmitt's, but the state-theoretical normal concept par excellence. - Moreover, the problematic of 'sovereignty' in the *Verfassungsstaat* does not necessarily lead to its reduction to the state of exception; it can also end in the statement that the concept is simply of no use in the *Verfassungsstaat*, or in the attempt to transpose it to another level in order to hold on to it despite everything, e.g., as 'sovereignty of reason', of 'right', or of the 'state'.

b) Sovereignty of 'Right' and of 'Reason'. When all state power in the *Verfassungsstaat* is determined and limited by constitutional law, including the bearer of sovereignty, then it is natural to no longer see him, but the legal order itself as the actual sovereign. This conceptual step was taken by the "Doctrinaires" in the Restoration monarchy. We find this view, for example, in VICTOR COUSIN, who—starting from the equation of *souveraineté* with *droit* (right/law)—asks about the origin of right and, since one cannot derive right from power or will, finds it in reason: "*La raison est donc le vrai, le seul principe du droit et de la souveraineté*" (Reason is therefore the true, the only principle of right and of sovereignty). In a similar way, GUIZOT emphasizes—against the idea of *Volkssouveränität*, which ultimately leads to the rule of only one faction—the sovereignty of reason and justice: "*Je crois à la souveraineté de la raison, de la justice, du droit*" (I believe in the sovereignty of reason, of justice, of right). This reason of right is realized for the Doctrinaires in the *gouvernements libres* (free governments). What was an expression for the Doctrinaires in the first half of the 19th century of a political option for the Charter of 1814, which mediates between monarchical legitimacy and the achievements of the Revolution, between princely rule and the rights of the *Volk*, has a more general background. Underlying these considerations is the question, already raised in antiquity, of whether the legislator or the law, the will or reason, should rule. The classic doctrine of sovereignty, in this dispute, fundamentally sides with the will, with the legislator as the creator of law: "*authoritas, non veritas, facit legem*" (authority, not truth, makes law). But already in the 18th century, this is countered by the idea of a sovereignty of the *ordre naturel*, of *Naturrecht* or of rational right, to which the ruler has to conform.

It is true that this idea has not managed to prevail against the idea of *Volkssouveränität* or of *souveraineté nationale*, but it is still effective today in the belief in a rational popular will and in the subordination of the principles of the constitution to the legislator. In a highly formalized way, it reappeared at the beginning of the 20th century in Krabbe's "Doctrine of the Sovereignty of Law" and in Kelsen's "Problem of Sovereignty and the Theory of International Law."

c) '*Staatssouveränität*'. In Germany, the idea of a sovereignty of reason or of right was hardly received. Here, the problem of constructing a supreme power in the *Verfassungsstaat* was solved with the help of the figure of *Staatssouveränität* (state sovereignty). The 'sovereignty of the state' is already spoken of in older theory; for example, BODIN calls sovereignty a *puissance absolue et perpetuelle d'une Republique*. Mostly, in this context, reference is made to GROTIUS's *summae potestatis subjectum commune est civitas* (the common subject of supreme power is the state). Originally, definitions of this kind served only to fix the circle of subjects of international law, those entitled to wage war; they leave open, however, the question of who is 'sovereign' within a state, which is what the concept of '*Staatssouveränität*' in the narrower sense aims at. Even there, where at the beginning of the 19th century the 'sovereignty of the German states', of the former territories of the Reich and later members of the Confederation of the Rhine, is spoken of, it is primarily the so-called 'external sovereignty', the independence from a higher association, that is meant. But at this time, the idea of sovereignty is already being used for the legitimation of internal modernization programs of the bureaucracy in the so-called 'revolution from above', which are directed at the enforcement of state power against traditional feudal-autonomous and monarchical-patrimonial claims to rule.

In a decided manner, HEGEL speaks in his "*Philosophy of Right*" of the sovereignty of the state as an internal sovereignty... "These two determinations, that the particular affairs and powers of the state are neither independent and firm for themselves, nor in the particular will of individuals, but have their ultimate root in the unity of the state as their simple self, constitute the sovereignty of the state." The idea of *Staatssouveränität* reaches its peak in Germany around the middle of the last century as a formula that is supposed to overcome the extreme versions of both '*Volks*-' and '*Fürstensouveränität*', which are incompatible with each other as well as with the constitutional rules. Thus HEINRICH ALBERT ZACHARIÄ proclaims: "In place of the untenable concept of *Volkssouveränetät*, which is subject to the most dangerous abuse and excludes all stability of the state order, in the Rousseauian or other vulgar sense, we posit the concept of *Staatssouveränetät*, but only in opposition to the false and abused *Fürstensouveränetät*, in order to express the idea that only the organic commonwealth itself (the institution of the state) is the source of all public power, and that never an individual, by invoking his private right, nor a part of the whole, because of its special interest, is entitled to hinder the whole in the necessary development and transformation of the constitution in a legal form or to make the continued existence of the state dependent on its consent."

The idea of the state, which itself is sovereign, is constructed with the help of the theory of legal personality and the organism theory. According to the theory of legal personality in its form further developed in the 19th century, the state is no longer merely a legal subject to whom certain legal positions can be attributed, but it also acts itself, namely through 'organs', as is said with recourse to the likewise reviving organism theory. With both approaches, it is attempted to conceive the multitude of specific functions and functionaries in the modern *Verfassungsstaat* as something unified, without having to fall back on a special sovereign instance that guarantees this unity. Rather, the connection of the various

functionaries appears to be guaranteed by conceiving them as functionally coordinated 'organs' of the state. Sovereign is therefore here not a specific person, not a specific organ, but the state itself as the totality of its functionaries or as the ideal unity underlying them. In this sense, CARL FRIEDRICH VON GERBER, the creator of modern German state law doctrine, describes the state power, i.e., "the will-power of a personally conceived ethical organism, which represents the ethical collective will of a *Volk*," as sovereign.

Besides these efforts to hold on to the concept of sovereignty in the *Verfassungsstaat* in abstracto, there are also attempts to single out one of the state organs as the leading one, as the "brain" or "head" of the state-person, and in this way to name a concrete bearer of state sovereignty and a guarantor of state unity. With the help of the idea of the "head of state," which is usually identified with the person of the prince, the constitutional theory can moreover be brought into harmony with the monarchical principle normatively given in the German constitutions. Both organological conceptions of sovereignty are found united in BLUNTSCHLI: "As certainly as the whole is mightier than any part of the whole, so certainly is the sovereignty of the whole state superior to the sovereignty of any single member in the state; and at the same time: Besides this sovereignty inherent in the entire state or body of the *Volk*, there is yet within the state a sovereignty of the supreme member, of the head, the regent's—or, as it most clearly emerges in the monarchy, the *Fürstensouveränität*." From the '*Staatssouveränität*', a 'sovereignty of the organ' thus results in effect, which JELLINEK expresses concisely and succinctly thus: "The sovereignty of the state and of the organ, through which it acts, therefore... simply coincide."

Despite or precisely because of its high theoretical claim and its character aiming at reconciling opposites, the doctrine of *Staatssouveränität* has experienced manifold criticism. Thus, the impossibility was censured of elevating the state to the 'sovereign', since it also encompasses the ruled. It was censured that the concept does not answer the central question of who decides as 'sovereign' in case of conflict. Furthermore, it was criticized that the sovereign head, in this conception, appears not over, but under the state, and finally, that the concept no longer includes any limitation of sovereign power. Nevertheless, the idea of *Staatssouveränität* quickly established itself in Germany; the expressions *Fürstensouverainetät*, *Volkssouverainetät*, *Nationalsouverainetät* were henceforth only keywords for various political endeavors, until at the end, in the 20th century, the idea of *Volkssouveränität* again gained the upper hand.

3. Sovereignty and Federal Order

a) Sovereignty in the Federal State (*Bundesstaat*). Despite the considerable problems that the application of the concept of sovereignty poses for the theory of the *Verfassungsstaat*, the concept of sovereignty does not experience its first fundamental rejection here, but in the doctrine of the *Bundesstaat*. This is connected with the development of new forms of state associations at the end of the 18th century in the USA and in the 19th century in Switzerland and in Germany. In contrast to the traditional confederation of states (*Staatenbund*), the new federal orders, called '*Bundesstaat*', possess an independent state power with specific competences. This innovation leads to the question of to whom sovereignty is now to be attributed. It is first answered with the assumption of a divided or dual sovereignty between the central state and the member states, whereby division here means a division of the state's sphere of competence and not, as in the unitary *Verfassungsstaat*, the participation of several in the (exercise of) sovereign power.

The idea of a divided sovereignty is first found in the "*Federalist Papers*," whose authors reject the traditional confederation of states with the argument that it does not solve the sovereignty question unequivocally, because on the one hand it provides for a "sovereignty over sovereigns" by subordinating the common institutions of the federation to the member states, but on the other hand it denies the federation the possibility of its own state exercise of power and thus makes it dependent on the individual states. The federal state solution is contrasted with this as a 'coexistence' of central state and member states. It is true that the federation in the federal state has its own state power; in contrast to the unitary state, however, no "*complete national sovereignty*" is intended here, but only a "*partial Union*", in which the "*State Governments... retain all the rights of sovereignty... which were not... exclusively delegated to the United States*"; the "*alienation of State sovereignty*" is limited to a few cases.

In Germany, LUDOLPH HUGO had already spoken earlier, in the 17th century, of a division of majesty rights between a *respublica superior* and *res publicae inferiores*, in order to make the fact of a dual, both imperial and princely, government in the old Reich comprehensible. Interpretative approaches of this kind, however, fell victim to the triumphal march of the classical conception of sovereignty, which Pufendorf made at home in Germany. Associations of states were since then only conceivable as confederations of states, in which sovereignty and entire state power remained with the member states. The German Confederation of 1815 is also conceived as a confederation of sovereign individual states. In contrast, the necessity, in view of the strengthened integration efforts, to also establish a separate central power in Germany alongside the individual states, led in the Reich Constitution of 1849 to solutions that were similar to the federal state construction of the USA.

The federal order of the Reich Constitution of 1849 is based on older beginnings in German state doctrine, to distinguish between '*Staatenbund*' and '*Bundesstaat*'. These approaches culminate in 1853 in the federal state theory of GEORG WAITZ. Waitz also assumes that in the *Bundesstaat*, the "total state and the individual state have their special organization and their special sphere: within this sphere, the one is as independent as the other." Waitz continues: "One can not inappropriately call this independence with a common name in politics, Sovereignty; both the total state and the member states are sovereign, for only the scope, not the content of sovereignty is limited."

Despite its pragmatic plausibility, the theory of divided sovereignty soon finds its opponents, who, like CALHOUN, appeal to the classic argument: "*Sovereignty is an entire thing; — to divide, is, to destroy it*." This particularistic and—in the American Civil War—secessionist-promoting version of undivided sovereignty is, however, unable to assert itself in view of the institutional independence of the federation in the new federal systems and its superior power over all member states. Greater plausibility is therefore gained by the theories that, in view of the division of competences between the central state and the member states, attribute sovereignty to the federation, which can change the allocation of competences autocratically. In a generalized form, this argumentation is found in ALBERT HAENEL in 1873, who states about the state in general: "In this legal power of the state over its competence lies the supreme condition of self-sufficiency, the core point of its sovereignty." The identification of sovereignty with competence-competence undertaken here means a fundamental revision of the federal state theory. In place of the conceived coexistence of federation and member states now comes the superordination of the central state. At the same time, the fixation of sovereignty on the central state makes it necessary to recognize the existence of non-sovereign states and thus to devalue sovereignty to a non-essential characteristic of state power—a consequence that LABAND, the founder of modern Reich state law,

draws in 1883: "There are therefore sovereign and non-sovereign states; sovereignty is not an essential characteristic of the concept of the state, but a property of the independent state, of full state power." This first blow against the doctrine of sovereignty is soon followed by a second. Since the recognition of non-sovereign member states does not yet solve all the construction problems that the concept of sovereignty poses for the federal and constitutional state theory, HUGO PREUSS in 1889 demands to remove sovereignty, this "Proteus among the concepts," altogether from the dogmatics of state law. It is, he argues, which has been haunting modern state doctrine in various versions, the "theoretical abstraction from a time become history," the "fundamental principle of the absolutist state," just as the feudal principle was for the feudal state. For the comprehension of modern state practice, this concept is, on the contrary, unsuitable—a *radix malorum* (root of all evil).

b) The Sovereignty Critique of the 'Pluralists'. The critique of the concept of sovereignty is continued by the so-called 'Pluralists' at the beginning of the 20th century. It is also connected with reflections on a new federal order. In this, the new social formations of the developing industrial states find their first systematic consideration. In 1915, ERNEST BARKER in England notes "*a certain tendency to discredit the State*," which no longer stems solely from the "old doctrine of the natural rights of man," but from a "*new doctrine of the right of groups*." In consequence, this leads to a "*new federalistic theory of the State*," according to which every state is "*in its nature federal*," namely as a "*union of guilds or a community of communities*." For this view of the state, "*sovereignty... is not single and indivisible, but multiple and multicellular*." Barker refers to Guild Socialism and its critique of the state and sovereignty. This draws attention to an older tradition of socialist and anarchist doctrines, among them above all PROUDHON, who already in the middle of the 19th century had developed a theory of the federal structure of society from smaller units like families and communes to ever larger ones up to states and overarching confederations.

The older theories of social federalism are normative. In contrast, the Pluralists in the 20th century start empirically from the established modern system of associations. This becomes clear with HAROLD J. LASKI, who in 1915 contrasts a "*pluralistic theory of the State*" with the (Hegelian) "*monistic theory of the state*." Laski notes a coexistence of state and other associations like the church and the trade unions. In all of them, they are independent entities; the state is not, as the monistic theory claims, the all-encompassing unity that decides sovereignly in case of conflict. Rather, there can be loyalty conflicts: "*We have, therefore, to find the true meaning of sovereignty not in the coercive power possessed by its instrument, but in the fused good-will for which it stands... Where sovereignty prevails, where the State acts, it acts by the consent of...men*". The empirical problematization of the state's claim to sovereignty, which becomes clear in these statements, is also expressed by Laski in another place, when he answers the question of who actually brings a parliamentary act into being by stating that "*the real rulers of a society... are undiscoverable*," and adds: "*but with the real rulers must go sovereignty...*" This overlooks "*the legal theory of sovereignty*." More clearly than Laski, MARX had already formulated this critique of the concept of sovereignty when, on the occasion of his dispute with Proudhon, he pointed out that "it is the sovereigns who at all times have had to submit to economic conditions, but they have never been the ones to dictate laws to them."

The sovereignty critique of the socialists and anarchists, Marxists and Pluralists was borne by the belief in the withering away of the state, a hope that in 1922 led the French state law theorist DUGUIT to the bold assertion: "*La croyance à l'existence d'une puissance souveraine étatique ne correspond à rien de réel,*

qu'elle est en train de disparaître" (The belief in the existence of a sovereign state power corresponds to nothing real, it is in the process of disappearing). The fact that states, despite increasing dependence on the new groupings of social power, were then as later in a position to decide conflicts and to find obedience among those affected by their decisions, has, however, just as the insight into the indispensability of state regulations, led the neopluralism of our days to see the relationship of state and associations less in a competitive coexistence than in a togetherness, in which the state has the "*final choice*."

4. External Sovereignty

A similar fate as in the constitutional and the federal state befalls the concept of sovereignty also in the international sphere. That sovereignty has an external aspect is familiar to the theory from the beginning; the idea of a supreme power demands, besides the subordination of all lower powers in the state, also the independence from non-state powers like Emperor and Pope. Some authors like HEGEL distinguish the sovereignty against the outside from the sovereignty inside in a strict manner. This is supported by the fact that with the establishment of the sovereignty of a state towards the outside, nothing is yet said about its internal sovereignty, neither who is the bearer of this sovereignty, nor whether a specific state organ can be identified as "sovereign inside." The theory of international law has, however, also repeatedly been confronted with the phenomenon that states, although they possessed an internal sovereignty, were subordinate to others in external relations, as in the 19th century, for example, Bulgaria or Egypt to Turkey. The prevailing overlordship (the protectorate) of one state over another was, however, not called 'sovereignty', but was designated with the feudal-law expression 'suzerainty'; the dependent states were considered 'half-sovereign'—an extremely vague concept, indeed almost a contradiction in itself, as was admitted.

Even fully sovereign states are originally considered to be subject to international law, the *ius gentium*. This legal domain has, since Grotius, been developed for the regulation of their relations. 'Sovereignty' is therefore occasionally defined almost as "direct subjection to international law" or "exclusive immediacy under international law," and the contradiction that seems to lie in the fact that sovereign entities are subject to a higher law is resolved with the hint that this dependence means "independence from command," but not "independence from order." There have, however, always been authors who also understood sovereignty towards the outside as absolute power of disposal over the law. Thus HEGEL assumes that the states stand in a state of nature towards each other, their will is the highest law in their behavior towards others, and therefore their relations are based solely on contractual grounds. From a similar standpoint, JELLINEK, who defines 'sovereignty' as the "property of a state, by virtue of which it can be legally bound only by its own will," develops his so-called self-determination or self-binding theory of the state in confrontation with the competence-competence theory of ALBERT HAENEL. Haenel's doctrine, he argues, is sufficient in state law, but suffers in international law from the fact that states could not simply extend their competence over others—which would be equivalent to a denial of international law—but would have to regulate their relations in this area by contract. 'Sovereignty' therefore does not mean limitlessness; the state, as self-determining, limits and obliges itself through this very determination. The ambiguity of the relationship between free self-binding of the state and this binding being legally guaranteed by international law in Jellinek is resolved by the power theorists and neo-Hegelians in Germany, in that they completely deny the legal character of international law. For the Hegelian LASSON, international law is only a system of mere rules of prudence for a purely

power-theoretically interpreted relationship of the sovereign states to each other. In its complete independence, in its right of self-determination and above all of waging war, TREITSCHKE sees practically the criterion for the nature of the state.

X. Outlook

The current situation is characterized by the process, beginning in the 19th century, of devaluing and eliminating the concept of sovereignty on the one hand, and a forced effort to maintain it on the other. Constitutional-state, federal-state, and international developments make the concept of sovereignty after the First World War appear more and more as a bugbear hindering the progress of the doctrine of the state, with which apparently no meaningful ideas can be connected anymore. Consequently, 'sovereignty' is declared a historical concept, whose use has now become anachronistic. Contrary to this is only seemingly the simultaneous generalization of the expression into a universal concept, which is applied to all epochs, e.g., also to the autarky of the Greek polis. For even in this generalization, sovereignty loses its contemporary, political function. It fades into a purely theoretical catch-all category.

To be assessed differently, on the other hand, are the attempts to present 'sovereignty' with recourse to its classical conceptualization by Bodin as a concept still valid today, or to give it in one of the numerous "revisions" a new meaning, also valid for the present. Whether these approaches can be made fruitful for an understanding of the present state, however, remains to be seen. It could be, on the one hand, that the history of the concept of sovereignty... stands in the way of a substantive understanding of the problem of sovereignty appropriate to the present. On the other hand, the attempts are understandable to assure oneself of the efficiency of the state with the help of a newly conceived concept of sovereignty, to settle disputes internally and to preserve the autonomy of the society it represents externally—the "sovereignty renaissance" precisely in the developing countries makes this clear—, but not only the newly ignited discussion about the legitimacy of resistance against state power, but also the phenomenon of economic entanglements that negate state borders, and not least the problematic of international environmental pollution, show with what difficulties one has to reckon who wants to prove sovereignty as a plausible and valid concept even today.

HANS BOLDT

Literature

ADOLF DOCK, *Revolution und Restauration über die Souveränität* (Strasbourg 1900); DIETRICH W. GUNST, *Der Begriff der Souveränität im modernen Völkerrecht* (Berlin 1953); CHARLES E. MERRIAM, *History of the Theory of Sovereignty since Rousseau* (New York 1900); HUGO PREUSS, *Gemeinde, Staat, Reich als Gebietskörperschaften. Versuch einer deutschen Staatskonstruktion auf Grundlage der Genossenschaftstheorie* (Berlin 1889); KLAUS STREIFTHAU, *Die Souveränität des Parlaments. Ein Beitrag zur Aufnahme des Souveränitätsbegriffs in England im 19. Jahrhundert* (Stuttgart 1963); CARL FRIEDRICH OPHÜLS, *Staatshoheit und Gemeinschaftshoheit. Wandlungen des Souveränitätsbegriffs*, in: *Recht im Wandel. Beiträge zu Strömungen im heutigen Recht, Fschr. Hundertfünfzig Jahre Carl Heymanns Verlag KG*, ed. by CARL HERMANN ULE et al. (Cologne, Berlin, Bonn, Munich 1965), 519ff.; PETER GRAF KIELMANSEGG, *Volkssouveränität. Eine Untersuchung der Bedingungen demokratischer Legitimität* (Stuttgart 1977).